

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF  
TEXAS, DALLAS DIVISION**

**In Re: Highland Capital Management, L.P.** § Case No. **19-34054-SGJ-11**

The Charitable DAF Fund LP §

Appellant § 22-03052

vs. §

**Highland Capital Management, L.P.** §

Appellee § **3:22-CV-02280-S**

**[43] Order granting amended motion to dismiss adversary proceeding with prejudice (related document # 19) Entered on 9/30/2022**

**APPELLANT RECORD**

**VOLUME 22**

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and CLO Holdco, Ltd.*

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

In re:	§	Chapter 11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	
	§	
THE CHARITABLE DAF FUND, L.P.	§	
	§	
Plaintiff,	§	Adversary Proceeding No.
	§	
vs.	§	22-03052-sgj11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Defendant.	§	
	§	

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**APPELLANT'S SECOND AMENDED STATEMENT OF ISSUES AND  
DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. ("Appellant") hereby designates the following items to be included in the record and identifies the following issues with respect to its appeal of the Order Granting Defendant's Amended Motion to Dismiss Adversary Proceeding [Doc.43] which

was entered by the United States Bankruptcy Court for the Northern District of Texas on September 30, 2022.

**I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL**

Whether the Bankruptcy Court erred in granting Defendant's Amended Motion to Dismiss Adversary Proceeding.

**II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD**

1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 46].
2. The judgment, order, or decree appealed from: Order Granting Amended Motion to Dismiss Adversary Proceeding [Doc. 43].
3. Any opinion, findings of fact and conclusions of law of the bankruptcy court relating to the issues on appeal, including transcripts of all oral rulings: None.
3. Docket Sheet kept by the Bankruptcy Clerk.
4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 22-03052-sgj.

No.	Date Filed	Docket No.	Description/Document Text
1	5/25/22 (7/22/21)	1	(18 pgs; 4 docs) Adversary case 22-03052. ORDER REFERRING CASE 3:21-CV-1710-N from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division and Complaint by Charitable DAF Fund, LP against Highland Capital Management, L.P. Fee Amount \$350 (Attachments: # <u>1</u> Original Complaint # <u>2</u> Civil Cover Sheet # <u>3</u> Docket Sheet from 21-CV-1710). Nature(s) of suit: 02 (Other (e.g., other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, Marcey)
2	5/25/22 (10/5/21)	8	(8 pgs; 2 docs) MOTION for Reconsideration re 7 Order on Motion to Stay (Highland Capital Management, L.P.'s Motion for Reconsideration of Stay Order) filed by Highland Capital Management LP (Attachments: # <u>1</u> Exhibit A) Attorney Zachery Z. Annable added to party Highland Capital Management LP(pty: dft) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710 AS #8 ON

Vol. 2  000066  000081  Thru Vol. 6				10/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)
	3	5/25/22 (10/5/21)	9	(15 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re 8 MOTION for Reconsideration re 7 Order on Motion to Stay (Highland Capital Management, L.P.'s Motion for Reconsideration of Stay Order) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710 AS #9 ON 10/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)
	4	5/25/22 (10/5/21)	10	(1012 pgs; 28 docs) Appendix in Support filed by Highland Capital Management LP re 8 MOTION for Reconsideration re 7 Order on Motion to Stay (Highland Capital Management, L.P.'s Motion for Reconsideration of Stay Order) (Attachments: # <u>1</u> Exhibit 1 # <u>2</u> Exhibit 2 # <u>3</u> Exhibit 3 # <u>4</u> Exhibit 4 # <u>5</u> Exhibit 5 # <u>6</u> Exhibit 6 # <u>7</u> Exhibit 7 # <u>8</u> Exhibit 8 # <u>9</u> Exhibit 9 # <u>10</u> Exhibit 10 # <u>11</u> Exhibit 11 # <u>12</u> Exhibit 12 # <u>13</u> Exhibit 13 # <u>14</u> Exhibit 14 # <u>15</u> Exhibit 15 # <u>16</u> Exhibit 16 # <u>17</u> Exhibit 17 # <u>18</u> Exhibit 18 # <u>19</u> Exhibit 19 # <u>20</u> Exhibit 20 # <u>21</u> Exhibit 21 # <u>22</u> Exhibit 22 # <u>23</u> Exhibit 23 # <u>24</u> Exhibit 24 # <u>25</u> Exhibit 25 # <u>26</u> Exhibit 26 # <u>27</u> Exhibit 27) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710 AS #10 ON 10/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)
Vol. 7  001093  001101  001111	5	5/25/22 (10/5/21)	11	(8 pgs; 2 docs) MOTION to Dismiss (Highland Capital Management, L.P.'s Motion to Dismiss) filed by Highland Capital Management LP (Attachments: # <u>1</u> Exhibit A) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710 AS #11 ON 10/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)
	6	5/25/22 (10/5/21)	12	(10 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re 11 MOTION to Dismiss (Highland Capital Management, L.P.'s Motion to Dismiss) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710 AS #12 ON 10/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)
	7	5/25/22 (10/5/21)	13	((238 pgs; 4 docs) Appendix in Support filed by Highland Capital Management LP re 11 MOTION to Dismiss (Highland Capital Management, L.P.'s Motion to Dismiss) (Attachments: # <u>1</u> Exhibit 1 # <u>2</u> Exhibit 2 # <u>3</u> Exhibit 3) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710

Vol. 8			AS #13 ON 10/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)
001349	8 5/25/22 (10/27/21)	15	(3 pgs) RESPONSE filed by Charitable DAF Fund LP re: 8 MOTION for Reconsideration re 7 Order on Motion to Stay (Highland Capital Management, L.P.'s Motion for Reconsideration of Stay Order) (Sbaiti, Mazin) [ORIGINALLY FILED IN 21-CV-1710 AS #15 ON 10/27/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)
001352	9 5/25/22 (11/5/21)	16	(7 pgs) REPLY filed by Highland Capital Management LP re: 8 MOTION for Reconsideration re 7 Order on Motion to Stay (Highland Capital Management, L.P.'s Motion for Reconsideration of Stay Order) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710 AS #16 ON 11/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)
001359	10 5/25/22 (11/21/21)	18	(2 pgs) ORDER re: 8 Motion for Reconsideration. The Court grants Defendant's motion, lifts the stay, and refers this case to Judge Stacey G.C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, to be adjudicated as a matter related to the Chapter 11 Bankruptcy of HCM., Chapter 11 Case No. 10-34054. The Clerk of this Court and the Clerk of the Bankruptcy Court to which this case is referred are directed to take such actions as are necessary to docket this matter as an Adversary Proceeding associated with the aforementioned consolidated bankruptcy case. (Ordered by Judge David C Godbey on 5/19/2022) (oyh) (Main Document 18 replaced on 5/23/2022) (twd). (Entered: 05/20/2022) [ORIGINALLY FILED IN 21-CV-1710 AS #18 ON 11/21/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (*ERROR IN ENTRY: CORRECT CASE NUMBER IS: 19-34054*) (Okafor, Marcey)
001361	11 5/27/22	19	(8 pgs; 2 docs) Amended Motion to dismiss adversary proceeding (related document(s): <u>11</u> ) filed by Defendant Highland Capital Management, L.P. (Attachments:# <u>1</u> Exhibit A--Proposed Order) (Annable, Zachery)
001369	12 5/27/22	20	(12 pgs) Brief in support filed by Defendant Highland Capital Management, L.P. (RE: related document(s) <u>19</u> Amended Motion to dismiss adversary proceeding (related document(s): <u>11</u> )). (Annable, Zachery)
001381	13 5/27/22	21	(637 pgs) Support/supplemental document ( <i>Appendix in Support of Highland Capital Management, L.P.'s Amended</i>

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				Motion to Dismiss) filed by Defendant Highland Capital Management, L.P. (RE: related document(s) <u>19</u> Amended Motion to dismiss adversary proceeding (related document(s): <u>11</u> )). (Annable, Zachery)
Vol. 11 002018	14	6/1/22	23	(6 pgs; 2 docs) Notice of hearing filed by Defendant Highland Capital Management, L.P. (RE: related document(s) <u>19</u> Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, L.P.). Hearing to be held on 8/3/2022 at 02:30 PM at <a href="https://us.courts.webex.com/meet/jerniga">https://us.courts.webex.com/meet/jerniga</a> for <u>19</u> and for <u>19</u> , (Attachments: # <u>1</u> Exhibit A)(Hayward, Melissa)
002024	15	7/5/22	30	(12 pgs) Response opposed to (related document(s): <u>19</u> Amended Motion to dismiss adversary proceeding (related document(s): <u>11</u> ) filed by Defendant Highland Capital Management, L.P.) filed by Plaintiff Charitable DAF Fund, LP. (Ecker, C.) (Entered: 07/06/2022)
002036	16	7/26/22	31	(15 pgs) Reply to (related document(s): <u>30</u> Response filed by Plaintiff Charitable DAF Fund, LP) filed by Defendant Highland Capital Management, L.P.. (Annable, Zachery)
002051 Thru Vol 14	17	7/26/22	32	(865 pgs) Support/supplemental document ( <i>Amended Appendix in Support of Highland Capital Management, L.P.'s Amended Motion to Dismiss</i> ) filed by Defendant Highland Capital Management, L.P. (RE: related document(s) <u>21</u> Support/supplemental document). (Annable, Zachery)
Vol. 15 002916 Thru Vol. 18	18	8/1/22	34	(867 pgs; 23 docs) Witness and Exhibit List ( <i>Reorganized Debtor's Witness and Exhibit List with Respect to Evidentiary Hearing to Be Held on August 3, 2022</i> ) filed by Defendant Highland Capital Management, L.P. (RE: related document(s) <u>19</u> Amended Motion to dismiss adversary proceeding (related document(s): <u>11</u> )). (Attachments: # <u>1</u> Exhibit 1 # <u>2</u> Exhibit 2 # <u>3</u> Exhibit 3 # <u>4</u> Exhibit 4 # <u>5</u> Exhibit 5 # <u>6</u> Exhibit 6 # <u>7</u> Exhibit 7 # <u>8</u> Exhibit 8 # <u>9</u> Exhibit 9 # <u>10</u> Exhibit 10 # <u>11</u> Exhibit 11 # <u>12</u> Exhibit 12 # <u>13</u> Exhibit 13 # <u>14</u> Exhibit 14 # <u>15</u> Exhibit 15 # <u>16</u> Exhibit 16 # <u>17</u> Exhibit 17 # <u>18</u> Exhibit 18 # <u>19</u> Exhibit 19 # <u>20</u> Exhibit 20 # <u>21</u> Exhibit 21 # <u>22</u> Exhibit 22) (Annable, Zachery)
Vol. 19 003783 Thru Vol. 22	19	8/3/22	40	(1 pg) Court admitted exhibits date of hearing August 3, 2022 (RE: related document(s) <u>19</u> Amended Motion to dismiss adversary proceeding (related document(s): <u>11</u> ) filed by Defendant Highland Capital Management, L.P. (Attachments: # <u>1</u> Exhibit A--Proposed Order)) COURT ADMITTED EXHIBIT 17. COURT TOOK JUDICIAL NOTICE OF EXHIBITS 1-13, 21 AND 22. (Ellison, T.) (Entered: 08/04/2022)



Vol. 22 004651	20	9/30/22	42	(28 pgs) Memorandum of opinion regarding Defendant's amended motion to dismiss adversary proceeding (RE: related document(s) <u>19</u> Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, L.P.). Entered on 9/30/2022 (Okafor, Marcey)
004679	21	8/4/22	41	41 Transcript regarding Hearing Held 08/03/2022 (45 pages) RE: Motion to Dismiss Adversary Proceeding (19). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 11/2/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Kathy Rehling, kathyrehlingtranscripts@gmail.com, Telephone number 972-786-3063. (RE: related document(s) <u>37</u> Hearing held on 8/3/2022. (RE: related document(s) <u>19</u> Amended Motion to dismiss adversary proceeding (related document(s): <u>11</u> ) filed by Defendant Highland Capital Management, L.P.) (Appearances: G. Demo and Z. Annabel for Movant/Highland; J. Bridges for Respondant/Charitable DAF. Evidentiary hearing. Motion granted. Court to issue Opinion and Order.)). Transcript to be made available to the public on 11/2/2022. (Rehling, Kathy)

Dated: November 28, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 28<sup>th</sup> day of November, 2022.

/s/ Mazin A. Sbaiti  
Mazin A. Sbaiti



1 collateral attack on these orders under the doctrine of res  
2 judicata.

3 Similarly, as the Court remarked on June 8th, the Supreme  
4 Court's *Espinosa* decision, which rejected an attack based upon  
5 Federal Rule of Civil Procedure 60(b)(4) to a prior order that  
6 may have been unlawful, prohibits the Court from now  
7 reconsidering the January 9th and July 16th orders.

8 But even if Your Honor rules that res judicata does not  
9 apply, there are two independent reasons why the orders were  
10 not an unlawful extension of the Court's jurisdiction. The  
11 first is because the Court had jurisdiction to enter both of  
12 those orders as the ability to determine the colorability of  
13 claims is within the jurisdiction of the Court. The second is  
14 because the orders are justified by the *Barton* doctrine.

15 Lastly, Your Honor, Movants' argument that the Court may  
16 not act as a gatekeeper to determine the colorability of a  
17 claim for which it may not have jurisdiction is incorrect, and  
18 as Your Honor has mentioned and as Mr. Bridges unconvincingly  
19 tried to distinguish, the Fifth Circuit *Villegas v. Schmidt*  
20 case is a case on point and resolves that issue.

21 Turning to res judicata, Your Honor, it prevents the Court  
22 from revisiting these governance orders. CLO Holdco had  
23 formal notice of the Seery CEO motion and the opportunity to  
24 respond. It failed to do so. It is clearly bound.

25 As reflected on Debtor's Exhibit 4, CLO Holdco is a

1 wholly-owned subsidiary of the DAF. The DAF is its sole  
2 shareholder. There is no dispute about that. Importantly, at  
3 the time of both the January and July orders, Grant Scott was  
4 the only human being authorized to act on behalf of CLO Holdco  
5 and the DAF. The DAF did not respond to the Seery CEO motion,  
6 either.

7 And why is that important, Your Honor? It's because  
8 Movants argue in their reply that the DAF cannot be bound by  
9 res judicata because they did not receive notice of the July  
10 16th order. However, Your Honor, that is not the law. Res  
11 judicata binds parties to the dispute and their privies, and  
12 the DAF is bound to the prior orders even though it did not  
13 receive notice.

14 There are several cases, Your Honor, that stand for this  
15 unremarkable proposition. First I would point Your Honor to  
16 the Fifth Circuit's opinion of *Astron Industrial Associates v.*  
17 *Chrysler*, found at 405 F.2d 958, a Fifth Circuit case from  
18 1968. In that case, Your Honor, the Fifth Circuit held that  
19 the appellant was barred by the doctrine of res judicata from  
20 bringing a claim because its parent, which was its sole  
21 shareholder, would have been bound by res judicata.

22 *Astron* is consistent with the 1978 Fifth Circuit case of  
23 *Pollard v. Cockrell*, 578 F.2d 1002 (1978). And the Northern  
24 District of Texas in 2000 case of *Bank One v. Capital*  
25 *Associates*, 2000 U.S. Dist. LEXIS 11652, found that a parent

1 and a sole shareholder of an entity couldn't assert res  
2 judicata as a defense when those claims could have been  
3 brought against its wholly-owned subsidiary.

4 And lastly, Your Honor, the 2011 Southern District of  
5 Texas case, *West v. WRH Energy Partners*, 2011 LEXIS 5183, held  
6 that res judicata applied with respect to a partnership's  
7 general partner because the general partner was in privity  
8 with the partnership.

9 These cases are spot on and make sense. DAF is CLO  
10 Holdco's parent. Grant Scott was the only live person to  
11 represent these entities in any capacity at the relevant  
12 times. Accordingly, just as CLO Holdco is bound, DAF is  
13 bound.

14 Allowing DAF to assert a claim when its wholly-owned and  
15 controlled subsidiary is barred would allow entities to  
16 transfer claims amongst their related entities in order to  
17 relitigate them and they would never be finality. And, of  
18 course, Jim Dondero, as we know, consented to the January 9th  
19 order, which provided Mr. Seery protection in a variety of  
20 capacities.

21 And as Your Honor has pointed out, and as Mr. Bridges  
22 didn't have an answer for, neither CLO Holdco nor the DAF or  
23 any other party appealed any of the governance orders. And  
24 nobody challenged the validity of these orders at the  
25 confirmation hearing, where the terms of these orders were

1 front and center.

2 And importantly, Your Honor, the orders are clear and  
3 unambiguous. They require a Bankruptcy Court [sic] to seek  
4 Bankruptcy Court approval before they commence or pursue an  
5 action against the independent board, the CEO, CRO, or their  
6 agents. And they clearly and unambiguously set the standard  
7 of care for actions prospectively: gross negligence or  
8 willful misconduct.

9 The Bankruptcy Court had jurisdiction to enter the  
10 governance orders, which, as expressly indicated in the  
11 orders, were core proceedings dealing with the administration  
12 of the estate. No one challenged this finding of core  
13 jurisdiction. And as I will discuss later, the failure to  
14 challenge core jurisdiction is waived under applicable Supreme  
15 Court and Fifth Circuit precedent.

16 Your Honor, the Court [sic] does not argue that Movants  
17 have waived their right to seek adjudication of a lawsuit that  
18 passes through the colorability gate by an Article III Court.  
19 The issue is not before the Court, but the changes to the  
20 order that the Debtor agreed to make clearly -- clearly will  
21 provide Mr. Bridges' clients the ability to make that  
22 determination.

23 The Debtor is, however, arguing that the Movants have  
24 waived their right to contest the core jurisdiction of the  
25 Bankruptcy Court to make the determination that the claims are

1 colorable in the first place, and to challenge the exculpation  
2 provisions provided to the beneficiaries of those orders.

3 Accordingly, Your Honor, the elements of res judicata are  
4 satisfied. Both proceedings involve the same parties. The  
5 prior judgment was entered by a court of competent  
6 jurisdiction. The prior order was a final judgment on its  
7 merits. And they involved the same causes of action.

8 Importantly, the members of the independent board,  
9 including Jim Seery, relied on the protections contained in  
10 the January 9th and July 16th orders and would not have  
11 accepted these appointments if the protections weren't  
12 included. And how do we know this? Because each of them,  
13 both Mr. Seery and Mr. Dubel, both testified at the  
14 confirmation hearing on this very topic.

15 And I would like to put up on the screen an excerpt from  
16 Mr. Seery's testimony at confirmation, which is testimony  
17 included in the February 2nd, 2021 transcript, which is  
18 Exhibit 2 of the Debtor's exhibits.

19 THE COURT: Okay.

20 MR. POMERANTZ: And I would like to just read this,  
21 Your Honor.

22 "Q Okay. You mentioned that there were certain  
23 provisions of the January 9th order that were important  
24 to you and the other independent directors. Do I have  
25 that right?"

1 MR. POMERANTZ: A little bit later on, Mr. Seery  
2 testifies:

3 "A And then ultimately there'll be another provision  
4 in the agreement here, I don't see it off the top of my  
5 head, but a gatekeeper provision. And that provision"  
6 --

7 "Q Hold on one second, Mr. Seery."

8 MR. POMERANTZ: Please scroll.

9 "Q So, Paragraph 4 and 5, were those -- were those --  
10 were those provisions put in there at the insistence of  
11 the prospective independent directors?

12 "A Yes.

13 "Q Okay. Can we go to Paragraph 10, please? There  
14 you go."

15 Mr. Morris: Is this the other provision that you were  
16 referring to?

17 "A This is -- it's become to be known as the  
18 gatekeeper provision, but it's a provision that I  
19 actually got from other cases -- again, another very  
20 litigious case -- that I thought it was appropriate to  
21 bring it into this case. And the concept here is that  
22 when you are dealing with parties that seem to be  
23 willing to engage in decade-long litigation and  
24 multiple forums, not only domestically but even  
25 throughout the world, it seemed important and prudent



1 to me and a requirement that I set out that somebody  
2 would have to come to this Court, the Court with  
3 jurisdiction over these matters, and determine whether  
4 there was a colorable claim. And that colorable claim  
5 would have to show gross negligence and willful  
6 misconduct -- i.e., something that would not otherwise  
7 be indemnifiable" --

8 MR. POMERANTZ: Hold on one second.

9 "A So, basically, it set an exculpation standard for  
10 negligence. It exculpates the directors from  
11 negligence, and if somebody wants to bring a cause  
12 against the directors, they have to come to this Court  
13 first to get a finding that there's a colorable claim  
14 for gross negligence or willful misconduct."

15 "Q Would you have accepted the engagement as an  
16 independent director without the Paragraphs 4, 5, and  
17 10 that we just looked at?

18 "A No, these were very specific requests. The  
19 language here has been smithed, to be sure, but I  
20 provided the original language for Paragraph 10 and  
21 insisted on the guaranty provisions above to ensure  
22 that the indemnity would have some support.

23 "Q And ultimately did the Committee and the Debtor  
24 agree to provide all the protections afforded by  
25 Paragraphs 4, 5, and 10?

1 "A Yes."

2 MR. POMERANTZ: So, Your Honor, these -- this  
3 testimony also applied to as well as the CEO.

4 The testimony was echoed by Mr. Dubel, another member of  
5 the board. And I'm not going to put his testimony on the  
6 screen, but it can be found at Pages 272 to 281 of Exhibit 2,  
7 which is the February 2nd transcript.

8 Movants argue, however, that res judicata doesn't apply  
9 because the Court didn't have jurisdiction to enter these  
10 orders. And they argue that the order stripped the District  
11 Court of this jurisdiction. As I previously described, the  
12 Debtor is prepared to modify the governance orders to provide  
13 that the Court shall retain jurisdiction to -- on claims that  
14 pass through the gate only to the extent legally permissible.  
15 The modification does not appear to be good enough for the  
16 Movants. They continue to argue that the Bankruptcy Court  
17 can't even act as the exclusive gatekeeper to determine  
18 whether such actions are colorable as a prerequisite for  
19 commencing or pursuing an action.

20 The problem Movants run into is the Fifth Circuit's  
21 opinion of *Republic v. Shoaf* and various Supreme Court  
22 decisions, including *Espinosa*.

23 In *Shoaf*, the Fifth Circuit held that a party cannot  
24 subsequently challenge a confirmed plan that clearly and  
25 unambiguously released a third party, even if the Bankruptcy

1 Court lacked jurisdiction to approve the release in the first  
2 place. Movants' proper recourse was to appeal the governance  
3 orders, not to seek to collaterally attack them.

4 In *Shoaf*, the Fifth Circuit held that the confirmed plan  
5 was res judicata with respect to a suit by the creditor  
6 against the guarantor. And in so ruling, the Fifth Circuit  
7 says that the prong of res judicata standard that requires an  
8 order, prior order to be made by a court of competent  
9 jurisdiction is satisfied regardless of whether the issue was  
10 actually litigated. This is because whenever a court enters  
11 an order, it does so by implicitly making a finding of its  
12 jurisdiction, a determination that can't be attacked. And in  
13 fact, in the January 9th and the July 16th orders, it wasn't  
14 implicit, the Court's jurisdiction; it was set out that the  
15 Court had core jurisdiction.

16 Movants try to brush *Shoaf* aside, arguing that is the only  
17 case the Debtor cites to support res judicata argument and is  
18 a narrow opinion that has been questioned and distinguished.  
19 That's just not correct, Your Honor. Movants ignore that we  
20 have cited two United States Supreme Court cases, *Stoll v.*  
21 *Gottlieb* and *Chicot County Drainage District*, upon which the  
22 Fifth Circuit based its *Shoaf* decision. In each case, the  
23 U.S. Supreme Court gave res judicata effect to a Bankruptcy  
24 Court order that made a ruling party -- that a ruling party  
25 later claimed was beyond the Court's jurisdiction to do so.

1 In *Stoll*, it was a release of guaranty without jurisdiction,  
2 like *Shoaf*. In *Chicot*, it was an extinguishment of a bond  
3 claim without jurisdiction.

4 Similarly, Your Honor, the U.S. Supreme Court held in  
5 *Espinosa* that a party was not entitled to reconsideration of a  
6 Bankruptcy Court order under Federal Rule of Civil Procedure  
7 60(b)(4) discharging a student loan without making the  
8 required statutory finding of undue hardship in an adversary  
9 proceeding. And the Supreme Court reasoned in that opinion as  
10 follows: A judgment is not void, for example, simply because  
11 it may have been erroneous. Similarly, a motion under  
12 60(b)(4) is not a substitute for a timely appeal. Instead,  
13 60(b)(4) applies only in the rare instance where a judgment is  
14 premised either on a certain type of jurisdictional error or a  
15 violation of due process that deprives a party of notice or  
16 the opportunity to be heard.

17 Federal courts considering Rule 60(b)(4) motions that  
18 assert a judgment is void because of a jurisdictional defect  
19 generally have reserved it only for the exceptional case in  
20 which the court that rendered the judgment lacked even an  
21 arguable basis for jurisdiction. This case is not the  
22 exceptional -- exceptional circumstance that was referred to  
23 by *Espinosa*.

24 In addition, we argue in our brief, and I'll get to in a  
25 few moments, that both of the orders are justified under the

1     Barton doctrine.

2             Actually, before I go to that, Your Honor, I think Movants  
3     are really trying to distinguish *Espinosa* by arguing that the  
4     Court's order exculpating Mr. Seery for negligence liability  
5     did not provide people, mom-and-pop investors, with the due  
6     process informing them that they would not be able to assert  
7     duty claims based upon mere negligence. I think that's the  
8     core of Mr. Bridges' argument, that, hey, you entered an  
9     order, you gave this exculpation, it was inappropriate, and it  
10    couldn't be done.

11            There are several problems with Movants' argument. First,  
12    Movants mischaracterize both the facts and the law in  
13    connection with the Debtor's relationship with its investors.  
14    The Debtor is the registered investment advisor for HCLOF as  
15    well as approximately 15 to 18 CLOs. The only investor in  
16    HCLOF other than the Debtor is CLO Holdco. The investors in  
17    the CLOs are the retail funds advised by the Dondero advisors  
18    and the other -- and other institutional investors.  
19    Accordingly, the thousands of investors, the mom-and-pop  
20    investors whose due process rights have allegedly been  
21    trampled by the January 9th and July 16th orders, are not  
22    investors in any funds managed by the Debtor.

23            And, of course, I have mentioned, as I've mentioned  
24    before, no non -- non-Dondero investor, be it a mom-and-pop  
25    investor, another institutional investor, anyone unrelated to

1 Mr. Dondero, has ever appeared in this Court to challenge the  
2 Debtor's activities.

3 But more fundamentally, Your Honor, the Debtor does not  
4 owe fiduciary duties to investors in any of the funds that the  
5 Debtor advises. The fiduciary duty that the Debtor owes is to  
6 the funds themselves, not the investors in the funds.

7 And while Movants point to Mr. Seery's prior testimony to  
8 support the argument that the Debtor owes a duty to investors,  
9 Mr. Seery was not testifying as a lawyer and his testimony  
10 just cannot change the law.

11 As to each of the funds that the Debtor manages, HCLOF and  
12 the CLOs, they were each provided with actual notice of the  
13 January 16th -- the July 16th order and didn't object. And as  
14 Your Honor will recall, the Trustees for the CLOs, the party  
15 that could potentially have claims for breach of fiduciary  
16 duty, they participated in the January 9th hearing. They came  
17 to the Court and were concerned about the protocols that the  
18 Debtor was agreeing to with the Committee. We revised them.  
19 The Trustees didn't object. They didn't object then; they  
20 didn't object now. And, in fact, they consented to the  
21 assumption of the contracts between the Debtor and the CLOs.

22 So the argument that the orders, by having this  
23 exculpation for future conduct, violated due process rights of  
24 anyone and is the type -- essentially, the type of order that  
25 *Espinosa* would have contemplated could be attacked, is --



1 relies on faulty legal and factual premises. No duty to  
2 investors. No private right of action. And both -- and all  
3 the funds received due process.

4 In addition, Your Honor, as we argue in our brief and I'll  
5 get to in a few moments, both of the orders are justified  
6 under the *Barton* doctrine, as Mr. Seery is entitled to  
7 protection based upon how courts around the country have  
8 interpreted the *Barton* doctrine. As such, Mr. Seery is  
9 performing his role both as an agent of the independent board  
10 under the January 9th order, as a CEO under the July 16th  
11 order, as a quasi-judicial officer. And as Your Honor  
12 examined in the *Ondova* opinion which you mentioned, trustees  
13 are entitled to qualified immunity for damage to third parties  
14 resulting from simple negligence, provided that the trustee is  
15 operating within the scope of his duties and is not acting in  
16 an *ultra vires* manner.

17 So, exculpating the independent directors, their agents,  
18 and the CEO in the January 9th and July 16th orders was a  
19 recognition by this Court that they would be entitled to  
20 qualified immunity, much in the same way trustees are.

21 No doubt that Movants contend that this was error and that  
22 the Court overreached. However, the remedy for that overreach  
23 was an appeal, not a reconsideration 16 months later. The  
24 Court's orders based upon the determination that in this  
25 highly contentious case that these court officers needed to be

1 protected from negligence suits is not the exceptional case  
2 where the Court lacked any arguable basis for jurisdiction.  
3 Accordingly, this Court must follow *Espinosa*, *Shoaf*, *Stoll*,  
4 and *Chicot* and reject the attack on the prior court orders.

5 The only case Movants cite to challenge the Supreme  
6 Court's decision -- to challenge the Supreme Court precedent I  
7 mentioned and the Fifth Circuit's *Shoaf* decision is the  
8 *Applewood* case. *Applewood* is totally consistent with *Shoaf*.  
9 *Applewood* also involved a plan that purported to release a  
10 guaranty claim that the guarantor argued was res judicata in  
11 subsequent litigation regarding the guaranty. The Fifth  
12 Circuit held in that case that the plan was not res judicata.  
13 It made that ruling because the plan did not contain clear and  
14 unambiguous language releasing the guaranty. In that way, the  
15 Fifth Circuit distinguished *Shoaf*.

16 *Applewood* and *Shoaf* are consistent. A Bankruptcy Court  
17 order will be given res judicata effect, even if the Court  
18 didn't have jurisdiction to enter it, if the order was clear  
19 and unambiguous. In *Shoaf*, the release was. In *Applewood*, it  
20 wasn't.

21 Movants argued on June 8th and argue now that the  
22 *Applewood* case really argues -- really deals with prospective  
23 exculpation of claims. I went back and read Mr. Bridges'  
24 comments carefully of June 8th. He said *Applewood*,  
25 exculpation. Well, that's just not correct. *Applewood* is all

1 about requiring specificity of a (garbled) to give it res  
2 judicata effect. Claims that existed at that time, were they  
3 described clearly and unambiguously? Yes? *Shoaf* applies.  
4 No? *Applewood* does -- applies.

5 So how should the Court apply these principles here? The  
6 Court approved a procedure for certain claims in the  
7 governance orders. The procedure: come to Bankruptcy Court  
8 before pursuing a claim against the independent directors and  
9 Seery or their agents so that the Court can make a  
10 colorability determination. Clear and unambiguous. The  
11 governance orders each provide that the Bankruptcy Court had  
12 jurisdiction to enter the orders, and the orders were not  
13 appealed.

14 Movants attempt to confuse the Court and argue *Applewood*  
15 is on point because the January 9th and July 16th orders do  
16 not clearly identify specific claims that Movants now have  
17 that are being released. And because they're not specific,  
18 then basically it's an ambiguous release and *Applewood*  
19 applies.

20 The problem with the Movants' argument is that neither the  
21 January 9th or July 16th orders released claims that existed  
22 at that time. If they did, and if there wasn't an adequate  
23 description, I might agree with Mr. Bridges that *Applewood*  
24 applied. But there were no claims. It was prospective. It  
25 was a standard of care. The Court clearly and unambiguously

1 said what the standard of care would be going forward.  
2 Clearly, under *Shoaf* and Supreme Court precedent, they are  
3 entitled to res judicata because it's a clear and unambiguous  
4 provision. *Applewood* just simply doesn't apply.

5 Mr. Phillips at the last hearing made an impassioned plea  
6 to the Court for a narrow interpretation of the exculpation  
7 provisions in the January 9th and July 16th orders, and he  
8 argued that the Court could not possibly have intended for the  
9 exculpation for negligence to apply on a go forward basis. He  
10 thus argued to the Court that the Court should construe the  
11 exculpation narrowly and only apply it to potential claims of  
12 harm caused to the Debtor, as opposed to harm caused to third  
13 parties, which he said included thousands of innocent  
14 investors.

15 Of course, Mr. Phillips made those arguments unburdened by  
16 the actual facts and the prior proceedings which led to the  
17 entry of these orders, because, as he was the first to admit,  
18 he only became involved in the case a month ago.

19 As the Court recalls, and as reinforced by Mr. Seery's and  
20 Mr. Dubel's testimony I just mentioned, the exculpation  
21 provisions were included precisely to prevent Mr. Dondero,  
22 through any one of the entities he's owned and controlled, the  
23 Movants being two of those, from asserting baseless claims  
24 against the beneficiaries of those orders, exactly the  
25 situation Mr. Seery now finds himself in.

1 And, again, it bears emphasizing: throughout this case,  
2 not one of the purported public investors Mr. Phillips  
3 lamented would be prevented from holding Mr. Seery responsible  
4 for his conduct has ever appeared in this case to object about  
5 anything. And none of the directors of the funds, the funds  
6 where the Debtor acts as an investment adviser, have ever  
7 stepped foot in this court, either.

8 Even if the Court declines to apply res judicata, Your  
9 Honor, to prevent challenges to the governance orders, the  
10 Court has the jurisdiction, had the jurisdiction to include  
11 the gatekeeping provisions in those orders. The Bankruptcy  
12 Court derives its jurisdiction from 28 U.S.C. Section 157, and  
13 bankruptcy jurisdiction is divided into two parts: core  
14 matters, which are those arising in or arising under Title 11,  
15 and noncore matters, those matters which are related to a  
16 Chapter 11 case.

17 Bankruptcy Courts may enter final orders in core  
18 proceedings, and with the consent of parties, noncore  
19 proceedings. If a party does not consent to a final judgment  
20 in the noncore matters or waives its right to consent, then  
21 the Bankruptcy Court -- or does not waive its right to  
22 consent, then the Bankruptcy Court issues a report and  
23 recommendation to the District Court.

24 The seminal Fifth Circuit case on bankruptcy court  
25 jurisdiction is the 1987 case of *Wood v. Wood*, 825 F.2d 90.

1 There, the Fifth Circuit held that the Bankruptcy Court has  
2 related to jurisdiction over matters if the outcome of that  
3 proceeding could conceivably have any effect on the estate  
4 being administered in the bankruptcy.

5 More recently, the Fifth Circuit, in the 2005 case, in  
6 *Stonebridge Tech's*, elaborated on when a matter has a  
7 conceivable effect on the estate such as to confer Bankruptcy  
8 Court jurisdiction. There, the Fifth Circuit held that an  
9 action is related to bankruptcy if the outcome could alter the  
10 debtor's rights, liabilities, options, or freedom of action,  
11 either positively or negatively, and which in any way impacts  
12 upon the handling and the administration of the bankruptcy  
13 estate. It is against this backdrop, Your Honor, that the  
14 Court should evaluate its jurisdiction to have entered the  
15 orders.

16 So, again, what did the orders do? They established  
17 governance over the Chapter 11 debtor with new independent  
18 directors being approved. They established the procedures and  
19 protocols of how transactions were going to be presented to  
20 and approved by the Committee. They vested in the Committee  
21 certain related-party claims, and they provided for the  
22 procedures parties would have to follow to assert any claims  
23 against the independent directors and the CRO and the agents  
24 and advisors.

25 Your Honor, it's hard to imagine that there is a more core



1 order than the entry of these orders. At the time the orders  
2 were entered, the Court was well aware of the potential for  
3 acrimony from Mr. Dondero and his related entities, and  
4 included the gatekeeper provisions to prevent the Debtor's  
5 estate from being embroiled in frivolous litigation against  
6 the board and the CEO.

7 Such protections were clearly within the Court's  
8 jurisdiction, both to protect the administration of the estate  
9 but also under applicable Fifth Circuit law dealing with  
10 vexatious litigants, as set forth in the *Baum* and *Carroll*  
11 cases that the Court cited in its confirmation order.

12 Not that it was hard to predict, but the last several  
13 months have reinforced how important the gatekeeping  
14 provisions in the order are and how important similar  
15 provisions in the plan are.

16 The Court heard extensive testimony at the confirmation  
17 hearing regarding the havoc continued litigation by Mr.  
18 Dondero and his related entities would cause, which  
19 predictions have unfortunately been borne out by the  
20 unprecedented blizzard of litigation involving Mr. Dondero and  
21 his related entities that has consumed the Court over the last  
22 several months and caused the estate to incur millions of  
23 dollars in fees that could have been used to pay its  
24 creditors.

25 And these attacks are continuing. As I mentioned before,

1 in addition to the DAF lawsuit, Sbaiti & Co. filed an action  
2 against the Debtor on behalf of PCMG, another related entity,  
3 alleging postpetition mismanagement of the Select Fund.

4 And to complete the hat trick, they are the lawyers  
5 seeking to sue Acis in the Southern District of New York for  
6 allegedly post-confirmation matters.

7 The Court knew then and certainly knows now that the  
8 potential for sizable indemnification claims could consume the  
9 estate. The Court used that as the potential basis for  
10 determining that the orders were within its jurisdiction, just  
11 as it used that potential to justify the exculpation  
12 provisions in the plan as being consistent with *Pacific*  
13 *Lumber*.

14 Movants also ignore the cases -- and we cited in our  
15 opposition -- where courts in this district, including Judge  
16 Lynn in *Pilgrim's Pride* in 2010 and Judge Houser in the *CHC*  
17 *Group* in 2016, approved gatekeeper provisions that provided  
18 the Bankruptcy Court with exclusive jurisdiction to adjudicate  
19 claims against postpetition fiduciaries.

20 Movants also ignore cases outside this district, including  
21 *General Motors* and *Madoff*, which we cited in our brief as  
22 examples of cases where Bankruptcy Courts have been used as  
23 gatekeepers to determine if claims are colorable or being  
24 asserted against the correct entity.

25 And there's another reason, Your Honor, why Movants may

1 now not contest the Court's jurisdiction to have entered those  
2 orders. Each of those orders, as I said before, include a  
3 finding that the Court had core jurisdiction to enter the  
4 orders. No party contested that finding or refused to consent  
5 to the core jurisdiction.

6 Under well-established Supreme Court precedent, parties  
7 can waive their right to challenge the Bankruptcy Court's  
8 jurisdiction, core jurisdiction, by failing to object. In  
9 *Wellness v. Sharif* in 2015, the Supreme Court expressly held  
10 that Article III was not violated if parties knowingly and  
11 voluntarily consented to adjudication of *Stern v. Marshall*-  
12 type alter ego claims, and that the consent need not be  
13 express, so long as it was knowing and voluntary.

14 And *Wellness* confirmed the pre-*Stern* opinion of the Fifth  
15 Circuit in the 1995 *McFarland* case, which held that a person  
16 who fails to object to the Bankruptcy Court's assumption of  
17 core jurisdiction is deemed to have consented to the entry of  
18 a final order by the Bankruptcy Court.

19 Your Honor, I'd now like to turn to the *Barton* doctrine.  
20 The Court also has jurisdiction to have entered the orders  
21 based upon the *Barton* doctrine. The *Barton* doctrine dates  
22 back to an old United States Supreme Court case and provides  
23 as a general rule that, before a suit may be brought against a  
24 trustee, consent from the appointing court must be obtained.

25 Movants essentially make two arguments why the *Barton*

1 doctrine doesn't apply.

2 First, Movants, without citing any authority, argue that  
3 it does not apply to Mr. Seery because he is not a trustee or  
4 receiver and was not appointed by the Court. Although the  
5 doctrine was originally applied to receivers, it has been  
6 extended over time to cover various court-appointed  
7 fiduciaries and their agents in bankruptcy cases, including  
8 debtors in possession, officers and directors of the debtor,  
9 and the general partner of the debtor. And although Mr.  
10 Bridges says he couldn't find one case that applied the *Barton*  
11 doctrine to a court-retained professional, I will now talk  
12 about several such cases.

13 In *Helmer v. Pogue*, a 2012 case cited in our brief, the  
14 District Court for the Northern District of Alabama  
15 extensively analyzed the *Barton* doctrine jurisprudence from  
16 the Eleventh Circuit and beyond and concluded that it applied  
17 to debtors in possession. The *Helmer* Court relied in part on  
18 a prior 2000 decision of the Eleventh Circuit in *Carter v.*  
19 *Rodgers*, which held that the doctrine applies to both court-  
20 appointed and court-approved officers of the debtor, which is  
21 consistent with the law in other circuits.

22 And subsequently, the Eleventh Circuit again considered --  
23 and in that case, the distinction of a court-appointed as a  
24 court-retained professional was -- was not persuasive to the  
25 Court, and the Court held that a court-retained professional

1 can still have *Barton* protection, notwithstanding that he  
2 wasn't appointed, the argument that Mr. Bridges tries to make.

3 And subsequently, --

4 THE COURT: I wonder, was that -- was that Judge  
5 Clifton Jessup, by chance? Or maybe Bennett?

6 MR. POMERANTZ: Your Honor, this was -- this was the  
7 Eleventh Circuit *Carter v. Rodgers*, so I think Judge Jessup  
8 was --

9 THE COURT: Oh, I thought you were still talking  
10 about the Alabama case. No?

11 MR. POMERANTZ: Yeah, the Alabama -- well, the  
12 Alabama case referred to the Eleventh Circuit case, *Carter v.*  
13 *Rodgers*, --

14 THE COURT: Okay.

15 MR. POMERANTZ: -- and the appointment and -- or  
16 retention issue was discussed in the *Carter v. Rodgers* case.

17 THE COURT: Okay.

18 MR. POMERANTZ: And subsequently, the Eleventh  
19 Circuit again considered the contours of the *Barton* doctrine  
20 in *CDC Corp.*, a 2015 case, 2015 U.S. App. LEXIS 9718. In that  
21 case, which Your Honor referenced in your *Ondova* opinion,  
22 which I will discuss in a few moments, the Eleventh Circuit  
23 held that a debtor's general counsel who had been approved by  
24 the Court, who was appointed by a chief restructuring officer  
25 who was also approved by the Court, was covered by the *Barton*

1 doctrine for acts taken in furtherance of the administration  
2 of the estate and the liquidation of the assets.

3 And the Eleventh Circuit last year, in *Tufts v. Hay*, 977  
4 F.3d 204, reaffirmed that court-approved counsel who function  
5 as the equivalent of court-appointed officers are entitled to  
6 protection under *Barton*. While the Court in that case  
7 ultimately ruled that counsel could be sued without first  
8 going to the Bankruptcy Court, it did so because it determined  
9 that the suit between two sets of lawyers would not have any  
10 effect on the administration of the estate.

11 So, Your Honor, not only is there authority, there is  
12 overwhelming authority that Mr. Seery is entitled to the  
13 protections.

14 In *Gordon v. Nick*, a District -- a case from 1998 from the  
15 Fourth Circuit, the Court that the *Barton* doctrine applied to  
16 a lawsuit against a general partner who was responsible for  
17 administering the bankruptcy estate.

18 And as I mentioned, Your Honor, and as Your Honor  
19 mentioned, Your Honor had reason to look at the *Barton*  
20 doctrine in length and in depth in the 2017 *Ondova* opinion.  
21 And in the course of the opinion, Your Honor discussed one of  
22 the policy rationales for the doctrine, which you took from  
23 the Seventh Circuit's *Linton* opinion, and you said as follows:  
24 "Finally, another policy concern underlying the doctrine is a  
25 concern for the overall integrity of the bankruptcy process



1 and the threat of trustees being distracted from or  
2 intimidated from doing their jobs. For example, losers in the  
3 bankruptcy process might turn to other courts to try to become  
4 winners there by alleging the trustee did a negligent job."

5 Here, the independent board was approved by the Court as  
6 an alternative to the appointment of a Chapter 11 trustee.  
7 And it and its agent, including Mr. Seery as the CEO, even  
8 before the July 16th order, were provided protections in the  
9 form of the gatekeeper order and exculpation.

10 I'm sure the Court has a good recollection of the January  
11 9th hearing -- we've talked about it a lot in the proceedings  
12 before Your Honor -- where the Debtor and the Committee  
13 presented the governance resolution to Your Honor. And as  
14 Your Honor will recall, the appointment of the board was a  
15 hotly-contested issue among the Debtor and the Committee and  
16 was heavily negotiated. And the appointment of the  
17 independent board was even contested by the United States  
18 Trustee at a hearing on January 20th, 2020.

19 I refer the Court to the transcripts of the hearings on  
20 January 9th and January 20th of 2020, which clearly  
21 demonstrate that appointing this board and giving it the  
22 rights and protections and its agents the rights and  
23 protections was not your typical corporate governance issue,  
24 but it was essentially the Court's alternative to appointing a  
25 trustee. And recognizing that the members of the independent

1 board were essentially officers of the Court, the Court  
2 approved the gatekeeper provision, requiring parties first to  
3 come and seek the Court's permission before suing them, in  
4 order to prevent them from being harassed by frivolous  
5 litigation.

6 And the independent board was given the responsibility in  
7 the January 9th order to retain a CEO it deemed appropriate,  
8 and it did so by retaining Mr. Seery.

9 Recognizing the *Barton* doctrine as it applies to Mr. Seery  
10 is consistent with a legion of cases throughout the United  
11 States, and Movants' argument that Mr. Seery is not court-  
12 appointed is just wrong.

13 Second, Your Honor, Movants cite without any authority,  
14 argue that even if the *Barton* doctrine applied there is an  
15 exception which would allow it to pursue a claim against Mr.  
16 Seery without leave of the Court.

17 The Debtor agrees the 28 U.S.C. § 959 is an exception to  
18 the *Barton* doctrine. Section 959(a) provides that trustees,  
19 receivers, or managers of any property, including debtors in  
20 possession, may be sued without leave of the court appointing  
21 them with respect to any of their acts or transactions in  
22 carrying on business connected with such property.

23 As the Court also pointed out at the June 8th hearing, and  
24 Mr. Bridges alluded to in his argument, the last sentence of  
25 959(a) provides that such actions -- clearly referring to

1 actions that may be pursued without leave of the appointing  
2 court -- shall be subject to the general equity power of such  
3 court, so far as the same may be necessary to the ends of  
4 justice.

5 And Mr. Bridges made a plea, saying you can't take away my  
6 jury trial right there. You just cannot do that. Well, I  
7 have two answers to that, Your Honor. One, they relinquished  
8 their jury trial right. We've established that. Okay?

9 The second is allowing Your Honor to act as a gatekeeper  
10 has nothing to do with their jury trial right. Allowing Your  
11 Honor to act as a gatekeeper allows you to determine whether  
12 the action could go forward, and it'll either go forward in  
13 Your Honor's court or some other court.

14 And the argument that the exculpation was essentially a  
15 violation of 959 is just -- is just -- it just is twisting  
16 what happened. You have an exculpation provision. We already  
17 went through the authority the Court had to give an  
18 exculpation. With respect to these litigants who are before  
19 Your Honor -- we're not talking about anyone else who's coming  
20 in to try to get relief from the order; we're talking about  
21 these litigants -- we've already established that they were  
22 here, they're bound by res judicata. So their 959 argument  
23 goes away.

24 And as the Court -- and separate and apart from that, the  
25 issue at issue in the District Court litigation is -- is not

1 even subject to 959.

2 Mr. Bridges says, well, of course it is because it deals  
3 with the administration of the estate. I'd like to refer to  
4 what the Court said -- this Court said in its *Ondova* opinion:  
5 The exception generally applies to situations in which the  
6 trustee is operating a business and some stranger to the  
7 bankruptcy process might be harmed, such as a negligence claim  
8 in a slip-and-fall case, and is inapplicable to suits based  
9 upon actions taken to further the administering or liquidating  
10 the bankruptcy estate.

11 And your *Ondova* opinion is consistent with the Third and  
12 Eleventh Circuit opinions Your Honor cited in your opinion, as  
13 well as numerous other --

14 (Interruption.)

15 MR. POMERANTZ: -- from the -- from around the  
16 country, including cases from the First, Second, Sixth,  
17 Seventh, and Ninth Circuits. And I'm not going to give all  
18 the cites to those cases, but it's not a -- it's not a  
19 remarkable proposition that Your Honor relied on in *Ondova*.

20 In addition, several of these cases, including the  
21 Eleventh Circuit's *Carter* opinion, have been cited with  
22 approval by the Fifth Circuit in *National Business Association*  
23 *v. Lightfoot*, a 2008 unpublished opinion for this very point.  
24 The *Barton* exception of 959 does not apply to actions taken in  
25 the administration of the case and the liquidation of assets

1 in the estate.

2 Suffice it to say that it's clear that the Section 959  
3 exception to *Barton* has no applicability in this case.  
4 Movants, hardly strangers to the bankruptcy case, want to sue  
5 Mr. Seery for acts taken relating to a settlement of very  
6 complex and significant claims against the estate. They want  
7 to sue a court-appointed fiduciary for doing his job,  
8 resolving claims against the estate and his management of the  
9 bankruptcy estate. And they want to do this outside of the  
10 Bankruptcy Court.

11 Settlement of the HarbourVest claim, which is where this  
12 claim arises under -- whether it's a collateral attack now or  
13 not, and we say it is, is for another issue -- but it clearly  
14 arises in the context of settlement of the HarbourVest claim,  
15 is the quintessential act to further the administration and  
16 liquidation of the bankruptcy estate, and certainly doesn't  
17 fall within the 959 exception.

18 Movants seem to be arguing that 959(a) makes a distinction  
19 between claims against Mr. Seery that damaged the Debtor and  
20 claims against Mr. Seery that damaged third parties. However,  
21 the Movants make up that distinction, and it's not in the  
22 statute, it's not in the case law. The focus is not on who  
23 the conduct damages, but it's rather on whether the conduct  
24 was taken in connection with the administration or the  
25 liquidation of the estate.

1 And even if the Debtor is wrong, Your Honor, which it's  
2 not, the savings clause allows the Court to determine whether  
3 leave to be -- sue will be granted. Given that these claims  
4 are asserted by Dondero-related entities, if not controlled  
5 entities, no serious argument exists that the equities do not  
6 permit this Court to determine if leave to sue is appropriate.

7 Accordingly, Movants' argument that the orders create this  
8 tension with 959 is simply an over-dramatization. And in any  
9 event, Your Honor, there's a basis independent of *Barton* that  
10 supports the jurisdiction to enter the orders, as I mentioned.

11 But even if the orders only relied on *Barton*, there is an  
12 easy fix to Movants' concerns: let them come to court and  
13 argue that the type of suit they are bringing allegedly falls  
14 within the exception of 959.

15 Your Honor, Movants argue that the Bankruptcy Court may  
16 not act as a gatekeeper if it would not have jurisdiction to  
17 deal with the underlying action. They essentially argue that  
18 an Article I judge may not pass on the colorability of a  
19 claim, that it should be decided by an Article III judge.  
20 This is the same argument, Your Honor, that Your Honor  
21 rejected in connection with plan confirmation and which I  
22 touched on earlier.

23 And the reason why Your Honor rejected it is because  
24 there's no law to support it. In fact, there is Fifth Circuit  
25 law that holds to the contrary. And we talked about a little

1 bit the Fifth Circuit case decided is *Villegas v. Schmidt* in  
2 2015. And *Villegas* is a simple case. Schmidt was appointed  
3 trustee over a debtor and liquidated its estate and the  
4 Bankruptcy Court approved his final fees. Four years later,  
5 Villegas and the prior debtor sued Schmidt in District Court,  
6 the district in which the Bankruptcy Court was pending,  
7 arguing that he was negligent in the performance of his  
8 duties. The District Court dismissed the case because  
9 Villegas failed to obtain Bankruptcy Court approval to bring  
10 the suit under the *Barton* doctrine.

11 On appeal, Villegas argued *Barton* didn't apply for two  
12 reasons. First, that *Stern v. Marshall* created an exception  
13 to the *Barton* doctrine for claims that the Bankruptcy Court  
14 would not have the jurisdiction to adjudicate. And second,  
15 that *Barton* did not apply if the suit is brought in the  
16 District Court, which exercises supervisory authority over the  
17 Bankruptcy Court that appointed the trustee. Pretty much the  
18 argument that was made by Movants at the contempt hearing.

19 The Fifth Circuit rejected both arguments. It held that  
20 the existence of a *Stern* claim does not impact the Bankruptcy  
21 Court's authority because *Stern* did not overrule *Barton* and  
22 the Supreme Court had cautioned circuit courts against  
23 interpreting later cases as impliedly overruling prior cases.

24 More importantly, the Fifth Circuit pointed to a post-  
25 *Stern* 2014 case, *Executive Benefits v. Arkison*, 573 U.S. 25

1 (2014), which held that *Stern* does not decide how a Bankruptcy  
2 Court or District Courts should proceed when a *Stern* creditor  
3 is identified, as support for the argument that *Barton* is  
4 still good law, even dealing with a *Stern* claim.

5 Second, the Fifth Circuit, joining every circuit to have  
6 addressed the issue, ruled that the District Court and the  
7 Bankruptcy Court are distinct from one another and the  
8 Bankruptcy Court has the exclusive authority to determine the  
9 colorability of *Barton* claims and that the supervisory  
10 District Court does not.

11 Movants didn't address *Villegas* in their reply. Briefly  
12 tried to distinguish it, unconvincingly, today. The bottom  
13 line is *Villegas* is directly applicable. Your Honor cited it  
14 in the *Ondova* opinion for precisely the proposition that  
15 *Barton* applies whether or not the Court has authority to  
16 adjudicate the claim.

17 Accordingly, Your Honor, it was within the Court's  
18 jurisdiction to require a party to seek approval of Your Honor  
19 on the colorability of a claim before an action may be  
20 commenced or pursued against the protected parties, even if  
21 Your Honor wouldn't have authority to adjudicate the claim at  
22 the end of the day.

23 In fact, some courts have even addressed the proper  
24 procedure for doing so, requiring the putative plaintiff to  
25 not only seek leave of Bankruptcy Court but also to provide a



1 draft complaint and a basis for the Court to determine if the  
2 claim is colorable.

3 Movants have done neither, and they should not be  
4 permitted to modify the final orders of the Court as a  
5 workaround.

6 Your Honor, that concludes my presentation. I'm happy to  
7 answer any questions Your Honor may have.

8 THE COURT: All right. Not at this time. All right.  
9 I'm going to figure out, do we need a break or not, depending  
10 on what Mr. Bridges tells me. I assume we're just doing this  
11 on argument today. I think that's what I heard. No witnesses  
12 or exhibits.

13 MR. BRIDGES: That is correct, Your Honor.

14 THE COURT: Okay. Mr. Bridges, how long do you  
15 expect your rebuttal to take so I can figure out does the  
16 Court need a break?

17 MR. BRIDGES: Fifteen minutes plus whatever it takes  
18 to submit agreed-to exhibits.

19 THE COURT: Okay. Let's take a five-minute bathroom  
20 break. We'll come back. It's -- what time is it? It's 1:11  
21 Central time. We'll come back in five minutes.

22 THE CLERK: All rise.

23 (A recess ensued from 1:11 p.m. until 1:17 p.m.)

24 THE CLERK: All rise.

25 THE COURT: All right. Please be seated. We're

1 going back on the record in the Highland matters.

2 Mr. Bridges, time for your rebuttal. I want to ask you a  
3 question right off the bat. Mr. Pomerantz pointed out  
4 something that was on my list that I forgot to ask you when  
5 you made your initial presentation. What is the authority  
6 you're relying on? You did not cite a statute or a rule *per*  
7 *se*, but I guess we can probably all agree that Bankruptcy Rule  
8 9024 and Federal Rule 60 is the authority that would govern  
9 your motion, correct?

10 MR. BRIDGES: I don't agree, Your Honor. I don't  
11 believe this is a final order that we're contesting here. And  
12 I think that's demonstrated by the Court's final confirmation  
13 -- plan -- plan confirmation order that seeks to modify this  
14 order or will modify this order upon being -- being effective.  
15 So I don't think so.

16 In the alternative, if we are challenging a final order,  
17 then I think you're right as to the rules that would be  
18 controlling.

19 THE COURT: All right. Well, let me back up. Why  
20 exactly do you say this would be an interlocutory order as  
21 opposed to a final order?

22 MR. BRIDGES: Because of its nature, Your Honor.  
23 While the appointment in the order or the approval of the  
24 appointment in the order might, as a separate component of the  
25 order, have -- have finality, the provisions -- the provisions

1 in it relating to gatekeeping and exculpation are, we think,  
2 by their very nature, quite obviously interlocutory and not  
3 permanent. They don't seem to indicate an intention by any of  
4 the parties that, 30 years from now, if Mr. Seery is still CEO  
5 at Highland, long after the bankruptcy case has ended, that  
6 nonetheless parties would be prohibited from bringing claims,  
7 strangers to this action would be prohibited from bringing  
8 claims related to his CEO role.

9 I think the nature of it demonstrates that, the  
10 modifications to it, and even the inclusion of it in the final  
11 plan confirmation, as well as -- can't read that.

12 THE COURT: Can you give me some authority? Because  
13 as we know, there's a lot of authority out there in the  
14 bankruptcy universe on what discrete orders are interlocutory  
15 in nature that a bankruptcy judge might routinely enter and  
16 which ones are final. You know, it would just probably, if I  
17 flipped open *Collier's*, I could -- you know, it would be mind-  
18 numbing.

19 So what authority can you rely on? I mean, is there any  
20 authority that says an employment order is not a final order?  
21 That would be shocking to me if you have cases to that effect,  
22 but, I mean, of course, sometimes we do interim on short  
23 notice and then final. But this would be shocking to me if  
24 there is case authority to support the argument this is not a  
25 final order. But I learn something new every day, so maybe I

1 would be shocked and there is.

2 MR. BRIDGES: Your Honor, I'd point you to *In re*  
3 *Smyth*, 207 F.3d 758, and *In re Royal Manor*, 525 B.K. 338  
4 [sic], for the proposition that retaining a bankruptcy  
5 professional is an interlocutory order.

6 THE COURT: Okay. Stop for a moment. The *Smyth*  
7 case. Which court is that?

8 MR. BRIDGES: Fifth Circuit.

9 THE COURT: Okay. So tell me the facts. I'm  
10 surprised I don't know about this case. But, again, I don't  
11 know every case. So, it held that an employment order is an  
12 interlocutory order?

13 MR. BRIDGES: Appointing counsel. A professional in  
14 the bankruptcy context, Your Honor.

15 THE COURT: Counsel for a debtor-in-possession? An  
16 order approving counsel was an interlocutory order?

17 MR. BRIDGES: Yes, or the Trustee's counsel.

18 THE COURT: Or the Trustee's counsel? Okay. What  
19 were the circumstances? Was this on an expedited basis and  
20 there wasn't a follow-up final order, or what?

21 MR. BRIDGES: Your Honor, I don't have -- I don't  
22 have that at the tip of my memory. I'm sorry.

23 THE COURT: Okay. And the other one, 525 B.R. 338,  
24 what court was that?

25 MR. BRIDGES: It's a Bankruptcy Court within the

1 Sixth Circuit. I'm not certain which district.

2 THE COURT: All right. Well, maybe one of you two  
3 over there can look them up and give me the context, because  
4 that is surprising authority. Or other lawyers on the WebEx  
5 maybe can do some quickie research.

6 Okay. We'll come back to that. But assuming that this  
7 was a final order, which I have just been presuming it was,  
8 Rule 60 is the authority you're going under? 9024 and Rule  
9 60, correct?

10 MR. BRIDGES: Your Honor, we have not invoked those  
11 rules. Alternatively, I think you're right that they would  
12 control if we are wrong about the interlocutory nature of the  
13 order.

14 THE COURT: Well, you have to be going under certain  
15 -- some kind of authority when you file a motion. So I'm --

16 MR. BRIDGES: As an alternative --

17 THE COURT: I'm approaching this exactly, I assure  
18 you, as the District Court or a Court of Appeals would. You  
19 know, you start out, what is the legal authority that is being  
20 invoked here?

21 MR. BRIDGES: Well, --

22 THE COURT: So I just assume Rule 60. I can't, you  
23 know, come up with anything else that would be the authority.

24 MR. BRIDGES: Yes, Your Honor. You also have  
25 inherent power to modify orders that are in violation of the

1 law. And we pointed you to --

2 THE COURT: Now, is that right? Is that really  
3 right? Why do we have Rule 60 if I can just willy-nilly, oh,  
4 I feel like I got that wrong two years ago? I can't do that,  
5 can I? Rule 60 is the template for when a court can do that.  
6 Parties are entitled to rely on orders of courts. And that's  
7 why we have Rule 60, right? So, --

8 MR. BRIDGES: Your Honor, I think -- I think that  
9 we're miscommunicating. I'm trying not to rely on Rule 60 in  
10 the first instance because in the first instance we view this  
11 as not a final order. So, in the first instance, --

12 THE COURT: I got that. And I've got my law clerks  
13 looking up your cases to see if they convince me. But I'm  
14 asking you to go to layer two. Assuming I don't agree with  
15 you these are final orders, what is your authority for the  
16 relief you're seeking?

17 MR. BRIDGES: Yes, Your Honor. Rule 60 would apply  
18 in the alternative.

19 THE COURT: All right.

20 MR. BRIDGES: That's correct.

21 THE COURT: So, which provision? Which provision of  
22 Rule 60? (b) what?

23 MR. BRIDGES: Your Honor, I'm not prepared to concede  
24 any of them. I don't have the rule in front of me.

25 THE COURT: You're not prepared to concede what?

1 MR. BRIDGES: Any of the provisions of Rule 60. Just  
2 (b) (1), (b) (2), especially, but I'm -- I'm -- Rule 60 is our  
3 basis, as is the particulars (b) (1), (2), (6) --

4 (Garbled audio.)

5 THE COURT: Okay. You're breaking up. Can you  
6 restate?

7 MR. BRIDGES: (b) (1), (2), and (6), as -- as well as  
8 any other provision, Your Honor, of Rule 60.

9 THE COURT: Okay. Well, so (1), mistake,  
10 inadvertence, surprise, excusable neglect. Which one of  
11 those?

12 MR. BRIDGES: All of the above, Your Honor.

13 THE COURT: Surprise? Who's surprised?

14 MR. BRIDGES: Your Honor, I think every potential  
15 litigant who discovers that your order purports to bar  
16 prospective unaccrued claims at the time the order issued  
17 would be surprised.

18 Frankly, I think Mr. Seery would be surprised, given his  
19 testimony that he owes fiduciary duty -- duties that he must  
20 abide by and that he appears to have, as I continue to  
21 represent to clients, to advisees, and to the SEC, that those  
22 duties are owing.

23 THE COURT: Okay. I'm giving you one more chance  
24 here to make clear on the record what provision of Rule 60(b)  
25 are you relying on, okay? I need to know. It's not in your

1 pleading.

2 MR. BRIDGES: Your Honor, --

3 THE COURT: So tell me specifically. I can only --

4 MR. BRIDGES: -- (b) (1) --

5 THE COURT: -- come up with a result here if I know  
6 exactly what's being presented.

7 MR. BRIDGES: Your Honor, (b) (1), (b) (2), and (b) (6)  
8 --

9 THE COURT: Which, okay, there are multiple parts to  
10 (1). You're saying somebody's surprised by the ruling. I  
11 don't know who. Really, all that matters is your client, the  
12 Movants. You're saying, even though they participated, --

13 MR. BRIDGES: Yes, Your Honor.

14 THE COURT: -- got notice, they're somehow surprised?  
15 Why are they surprised?

16 MR. BRIDGES: Yes, Your Honor.

17 THE COURT: Do you have evidence of their surprise?

18 MR. BRIDGES: Your Honor, our brief shows the  
19 intentions of all involved were not the interpretation of that  
20 order being advanced at this -- at this point in time. And  
21 so, yes, I believe that is evidence. The transcripts of the  
22 hearings I believe evidence that as well, that the  
23 understanding of everyone involved was not that future --  
24 unspecified future claims that had not accrued yet would be  
25 released under (b) (1). Yes, Your Honor.



1 THE COURT: Okay.

2 MR. BRIDGES: Under (b) (2), --

3 THE COURT: I don't have any evidence of that. All I  
4 have is the clear wording of the order. Okay. Let me just --  
5 just let me go through this.

6 Assuming Rule 60 (1) through (6) are what you're arguing  
7 here, what about Rule 60(c): a motion under Rule 60(b) must  
8 be made within a reasonable time? We're now 11 months --

9 MR. BRIDGES: Your Honor, --

10 THE COURT: We're now 11 months past the July 2020  
11 order. What is your authority for this being a reasonable  
12 time?

13 MR. BRIDGES: Yes, Your Honor. If I may back up one  
14 step before answering your question. Under (b) (2), we're  
15 relying on newly-discovered evidence that was discovered in  
16 late March and caused both the filing of this motion and the  
17 filing of the District Court action.

18 Under (b) (4), we believe that the order is --

19 THE COURT: Let me stop. Let me stop. What is my  
20 evidence that you're putting in the record that's newly  
21 discovered?

22 MR. BRIDGES: The evidence is detailed in the  
23 complaint that is in the record. You know, --

24 THE COURT: That's not evidence.

25 MR. BRIDGES: -- honestly, Your Honor, --

1 THE COURT: That is not evidence. Okay? A lawyer-  
2 drafted complaint in another court is not evidence. Okay?

3 MR. BRIDGES: Your Honor, I think, to be technical,  
4 that there is not a record yet, that we have evidence yet to  
5 be admitted on our exhibit list. I believe in this  
6 circumstance -- I understand that, in general, allegations in  
7 a pleading are not evidence. In this instance, when we're  
8 talking about whether or not new facts led to the filing of a  
9 lawsuit, I do believe that the allegations in the lawsuit are  
10 evidence of those new facts.

11 THE COURT: All right. Go on.

12 MR. BRIDGES: Under (b) (4), we believe the order is,  
13 in part, void. It is void because of the jurisdictional and  
14 other defects noted in our argument.

15 And also, under (b) (6) (garbled) ground for relief that  
16 we're appealing to the equitable powers of this Court to  
17 correct errors and manifest injustice towards not just the  
18 litigants here but to correct the order of the Court to make  
19 it comply with -- with the law, with the statutes promulgated  
20 by Congress and to respect the jurisdiction of the District  
21 Court.

22 THE COURT: All right. Do you agree with Mr.  
23 Pomerantz that the case law standard for Rule 60(b) (4) is  
24 exceptional circumstances? It's only applied so that a  
25 judgment is voided in exceptional circumstances. Do you

1 disagree with that case authority?

2 MR. BRIDGES: I would -- I would agree, in part, that  
3 unusual circumstances is not the ordinary case. I'm not  
4 entirely sure what you mean by exceptional, but I think we're  
5 on the same page.

6 THE COURT: Okay. It's not what I mean. That's just  
7 the case law standard. And I'm asking, do you agree with Mr.  
8 Pomerantz that that is the standard set forth in case law when  
9 applying 60(b)(4)? There have to be some sort of exceptional  
10 circumstances where there's just basically no chance the Court  
11 had authority to do what it did.

12 MR. BRIDGES: Out of the ordinary would be the phrase  
13 I would use, Your Honor.

14 THE COURT: Okay. So I guess then I'll go from  
15 there. Is it your argument that gatekeeping provisions in the  
16 bankruptcy world are out of the ordinary?

17 MR. BRIDGES: The exculpation of Mr. Seery for  
18 liability falling short of gross negligence or intentional  
19 wrongdoing in connection with his continuing to conduct the  
20 business of the Debtor as an investment advisor subject to the  
21 Advisers Act, yes, I would say that is out of the ordinary,  
22 that it is extraordinary, that it is --

23 THE COURT: Okay. What is your authority or evidence  
24 on that? Because this Court approves exculpation provisions  
25 regularly in connection with employment orders, and pretty

1 much every judge I know does. In fact, I'm wondering why this  
2 isn't just a term of compensation. You know, he's going to do  
3 x, y, z in the case. His compensation is going to be a, b, c,  
4 d, e. And by the way, we're going to set a standard of  
5 liability for his performance as CEO or investment banker,  
6 financial advisor, whatever, so that no one can sue him  
7 regarding his performance of his job duties unless it rises to  
8 the level of gross negligence, willful misconduct.

9 It's a term of employment that, from my vantage point,  
10 seems to be employed all the time. So it would be anything  
11 but exceptional circumstances. Do you have authority or  
12 evidence --

13 MR. BRIDGES: Your Honor, frankly, --

14 THE COURT: -- to the contrary?

15 MR. BRIDGES: Your Honor, frankly, I'm astonished at  
16 your view of that situation, that it would merely be a term of  
17 his employment, that vitiates the entire fiduciary duty  
18 standard created by the Advisers Act that tells him, with  
19 hundreds of millions of dollars of assets under management for  
20 people he's advising as a registered investment advisor,  
21 people he's advising who believe that he has a fiduciary duty  
22 to them and that it's enforceable, that the SEC, who monitors,  
23 believes he has an enforceable fiduciary duty to those people,  
24 and that he's testified that he has fiduciary duties to those  
25 people, and that Your Honor is saying no, just as a regular

1 term of employment we have undone the Advisers Act's  
2 imposition of an unwaivable fiduciary duty.

3 Your Honor, the order is void to the extent that it  
4 attempts to do so.

5 This is not an ordinary employment agreement, Your Honor.  
6 This is an attempt to exculpate someone from the key thing  
7 that our entire investment system depends upon, regulation by  
8 the SEC and the requirement in investment advisors to act as  
9 fiduciaries when they manage the money of another.

10 It would be the equivalent of telling lawyers who are  
11 appointed in a bankruptcy proceeding that they don't have any  
12 duties to their client, or at least not fiduciary duties.  
13 That the lawyers merely owe a duty not to be grossly negligent  
14 to their clients. That's not an ordinary term of employment,  
15 Your Honor.

16 THE COURT: All right. So I guess we're back to my  
17 question, was this brought within a reasonable time under Rule  
18 60(c)?

19 MR. BRIDGES: It was brought very quickly after the  
20 new evidence was discovered at the end of March, Your Honor,  
21 yes.

22 THE COURT: Okay. Well, I guess I'll just ask you  
23 one more question before you continue on with your rebuttal  
24 argument. I mean, again, I want your best argument of why  
25 *Villegas* doesn't absolutely permit the gatekeeping provisions

1 that you're challenging. And many cases were cited by Mr.  
2 Pomerantz in his brief where courts have extended the *Barton*  
3 doctrine to persons other than trustees. And so what is your  
4 best rebuttal to that?

5 MR. BRIDGES: Your Honor, we've already given it.  
6 I'm afraid --

7 THE COURT: Okay. If you don't want to say more, --

8 MR. BRIDGES: -- what I have is not --

9 THE COURT: -- I'm not going to make you say more.

10 MR. BRIDGES: I --

11 THE COURT: I'm just telling you what's on my brain.

12 MR. BRIDGES: I do. I want to -- I am apologizing in  
13 advance for repeating, but yes, *Villegas, Villegas*, however  
14 that case is pronounced, says that *Stern* is not an exception  
15 to the *Barton* doctrine.

16 THE COURT: Uh-huh.

17 MR. BRIDGES: 959(a) is an exception to the *Barton*  
18 doctrine. You are not operating under the *Barton* doctrine  
19 here. Even counsel's brief, the Debtor's brief, doesn't say  
20 *Barton* applies. It says it's consistent with *Barton*.

21 Your Honor, in our previous hearing, you directed me to  
22 the second sentence of 959(a) because you believe it's what  
23 empowers you to do the gatekeeping. It limits the gatekeeping  
24 that you can do by protecting jury rights, the right to trial,  
25 says you cannot discharge, undo, deprive a litigant of their

1 right to a trial, a jury trial.

2 THE COURT: Well, you mentioned it again, jury trial  
3 rights. Do you have any argument --

4 MR. BRIDGES: Yes, Your Honor.

5 THE COURT: -- of why that hasn't flown out the  
6 window?

7 MR. BRIDGES: Yes, Your Honor. I am told that  
8 Section 14(f) that counsel for the Debtor referred to is not a  
9 waiver of jury rights at all. It is an arbitration agreement.  
10 Your Honor is probably familiar how arbitration agreements  
11 work, is that they need not be elected. They need not be  
12 invoked by the parties. When they are, they create a  
13 situation where arbitration may be required. But a waiver of  
14 a jury right outside of arbitration is not part of this  
15 arbitration clause, or of any. The issue is not briefed or in  
16 evidence before the Court. We're relying on representations  
17 of counsel as to what that provision contains. That Mr. Seery  
18 wasn't even a party to that agreement, the advisory agreement,  
19 with the Charitable DAF. The arbitration agreement is subject  
20 to defenses that are not at issue here before the Court. That  
21 Movants' rights, their contractual rights to invoke the  
22 arbitration clause, also appear to be terminated by the  
23 orders' assertion of sole jurisdiction in this matter.

24 Your Honor, yes, our jury rights survive Section 14(f) in  
25 the advisory agreement with the DAF for all of those potential

1 reasons.

2 On top of that, it doesn't go to all of our causes of  
3 action. It goes to the contract cause of action. And to the  
4 extent they can argue that the other claims are subject to  
5 arbitration, that also is a defense and -- defensible and  
6 complex issue requiring the application of the Federal  
7 Arbitration Act, requiring consideration of the Federal  
8 Arbitration Act, which this Court doesn't have jurisdiction to  
9 do under 157(d).

10 THE COURT: What? Repeat that.

11 MR. BRIDGES: Yes. This Court does not have  
12 jurisdiction to determine whether or not arbitration --  
13 arbitration is enforceable due to the mandatory withdrawal of  
14 the reference provisions of 157(d).

15 THE COURT: That's just not consistent with Fifth  
16 Circuit authority. *National Gypsum*. What are some of these  
17 other arbitration cases? I've written an article on it. I  
18 can't remember them. That's just not right. Bankruptcy  
19 courts look at arbitration clauses all the time. Motions to  
20 compel arbitration.

21 MR. BRIDGES: Your Honor, under 157(d), in the  
22 circumstances of this case, if the Court is going to take into  
23 consideration an arbitration clause under the Federal  
24 Arbitration Act, when that clause is not in evidence and is  
25 not before the Court, then Movants respectfully move to



1 withdraw the reference of your consideration of that issue and  
2 of any proceeding and ask that you would issue only a report  
3 and recommendation rather than an order on that issue.

4 THE COURT: Okay. I regret that we even got off on  
5 this trail. I'm sorry. So just proceed with your rebuttal  
6 argument as you had envisioned it, Mr. Bridges.

7 MR. BRIDGES: Thank you, Your Honor.

8 Debtor's counsel says there's no private right of action  
9 under the Advisers Act. That is both inaccurate and  
10 misleading. The Advisory Act creates, imposes fiduciary  
11 duties that state law provides the cause of action for. It is  
12 a state law breach of fiduciary duty claim regarding --  
13 regarding fiduciary duties imposed as a matter of law by the  
14 Investment Advisers Act that is Count One in the District  
15 Court action.

16 Furthermore, that Act does create a private right of  
17 action for rescission. That would be rescission of the  
18 advisory agreement with the Charitable DAF, not rescission of  
19 the HarbourVest settlement.

20 Second, Your Honor, the notion that this Court has related  
21 to jurisdiction is irrelevant and beside the point. I would  
22 like to note for the record that the District Court civil  
23 cover sheet that omitted to state that this was a related  
24 action has been corrected, has been amended, and that that has  
25 taken place.

1 Counsel for the Debtor also appears to agree with us that  
2 the order ought to be modified for having asserted exclusive  
3 jurisdiction over colorable claims to the extent it's not  
4 legally permissible to do. And in trying to invoke the  
5 discussions between us as to how the orders might be fixed,  
6 what counsel does is tries to cabin the legally-permissible  
7 caveat to just the second half of the paragraph at issue. It  
8 is both -- both portions, the gatekeeping and the subsequent  
9 hearing of the claims, that should be limited to the extent it  
10 would be impermissible legally for this Court to make those  
11 decisions.

12 On top of that, Your Honor, merely stating "to the extent  
13 legally permissible" would result in a considerable amount of  
14 ambiguity in the order that would lead it, I fear, to be  
15 unenforceable as a matter of law.

16 Next, Your Honor, when Debtor's counsel talks about the  
17 authority in this case, it feels like we're ships passing in  
18 the night. He says that we're wrong in asserting that no case  
19 we can find involves both the *Barton* doctrine and the  
20 application of the business judgment rule where the Court is  
21 asked to defer, and he mentions cases that apply the *Barton*  
22 doctrine to an approval rather than an appointment. The Court  
23 is asked to --

24 (Garbled audio.)

25 THE COURT: I lost you for a moment. Could you

1 repeat the last 30 seconds?

2 MR. BRIDGES: Thank you, Your Honor. Yes. He points  
3 -- opposing counsel points us to case law where the *Barton*  
4 doctrine has been applied despite the Bankruptcy Court having  
5 merely approved rather than appointed the trustee or the, I'm  
6 sorry, the professional. But in doing so, he doesn't  
7 reference any case that has done so in the context of business  
8 judgment rule deference. It's like we're ships passing in the  
9 night.

10 What we're saying isn't that a mere approval can never  
11 rise to the level of the *Barton* doctrine. What we're saying  
12 is that, in combination with the business judgment rule  
13 deference, the two cannot go together. There's no authority  
14 for saying that they do.

15 We -- I further feel like we're ships passing in the night  
16 when he talks about *Shoaf*. Counsel says that in *Shoaf* there  
17 was a confirmed final plan and it specifically identified the  
18 released guaranty. And yeah, that distinguishes it from this  
19 case, just as it distinguished -- just as the *Applewood Chair*  
20 case distinguished it when there's not that specific  
21 identification. And here, we don't even have a final plan  
22 confirmation at the time these orders are being issued.  
23 Without that express -- express notion of what the claims are  
24 being discharged, *Shoaf* doesn't apply.

25 There, there was a guaranty to a party on a specific

1 indebtedness that was listed, identified with specificity, and  
2 disappeared as a result of the judgment, as a result of the  
3 judgment in the underlying case. Here, we're talking about  
4 any potential claim that might arise in the future. As of the  
5 July order's issuance, it didn't apply on its -- either it  
6 didn't apply to future claims that had not yet accrued or else  
7 in violation of *Applewood Chair*, it was releasing claims  
8 without identifying them.

9       Who does Seery owe a fiduciary duty to? Is it, as  
10 Debtor's counsel says, only to the funds and not to the  
11 investors, or does he also owe those duties to the investors  
12 as well? Your Honor, that is going to be a hotly-contested  
13 issue in this litigation, and it involves -- it requires  
14 consideration of the Advisers Act and the multitude of  
15 accompanying regulations. To just state that his fiduciary  
16 duties are limited in a way that couldn't affect anyone that  
17 is -- whose claims are precluded by the July order is both  
18 wrong on the law and is invoking something that will be a  
19 hotly-contested issue that falls under 157(d), where, again,  
20 this Court doesn't have the jurisdiction to decide that, other  
21 than in a report and recommendation.

22       The order is legally infirm because it's issued without  
23 jurisdiction for doing that as well.

24       Finally, Your Honor, I think (garbled) wrong direction  
25 with a statement that suggests that Mr. Seery is an agent of

1 the independent directors under the January order. He is, in  
2 fact, not an independent agent -- not an agent of any of the  
3 independent directors, but, at most, of the company that is  
4 controlled by the board, not -- not of individual directors  
5 who could confer on him -- who could confer on him any  
6 immunity that they have obtained from the January order just  
7 by having appointed him.

8 The proposed order from the other side failed to address  
9 either the ambiguity in the order or its attempt to exculpate  
10 Mr. Seery from the liability, including liability for which  
11 there is a jury trial right, and it is not a fix to the  
12 problem for that reason.

13 In order to make the order enforceable and to fix its  
14 infirmities, the Court would have to do significantly more.  
15 It would have to both apply the caveat from the final  
16 confirmation plan order, rope that caveat to the first part of  
17 the relevant paragraph, as well as the second part, and it  
18 would have to provide directive clarity to be enforceable  
19 rather than too vague.

20 Your Honor, I think that's all I have.

21 THE COURT: Okay. Just FYI, my law clerk pulled the  
22 *Smyth* case from 21 years ago from the Fifth Circuit. And  
23 while it more prominently deals with the issue of whether  
24 trustees -- in this case, it was a Chapter 11 trustee -- could  
25 be subjected to personal liability for damages to the

1     bankruptcy estate --

2             (Echoing.)

3             THE COURT:   Someone, put your phone on mute.   I don't  
4     know who that is.

5             It dealt with, you know, the standard of liability, that  
6     the trustee could not be sued for matters not to the level of  
7     gross negligence.

8             But it does say, in the very last paragraph, to my shock  
9     and amazement, that -- it's just one sentence in a 10-page  
10    opinion -- orders appointing counsel -- and it was talking  
11    about the trustee's lawyer he hired to handle appeals to the  
12    Fifth Circuit -- orders appointing counsel under the  
13    Bankruptcy Code are interlocutory and are not generally  
14    considered final and appealable.   And it cites one case from  
15    1993, the Middle District of Florida.   Live and learn.   There  
16    is one sentence in that opinion that says that.   But I don't  
17    know that it's hugely impactful here, but I did not know about  
18    that opinion and I'm rather surprised.

19            All right.   You were going to walk me through evidence,  
20    you said?

21            MR. BRIDGES:   Well, do I -- Your Honor, do you want  
22    to do that first before I submit --

23            THE COURT:   Yes, please.

24            MR. BRIDGES:   -- my rebuttal argument?

25            THE COURT:   Please.

1 MR. BRIDGES: Okay.

2 THE COURT: Uh-huh.

3 MR. BRIDGES: Your Honor, we would submit and offer  
4 Exhibits 1 through 44, with the exception of those that have  
5 been withdrawn, that are 2, 13 --

6 THE COURT: Okay. Slow down. Slow down. I need to  
7 get to the docket entry number we're talking about. Are we  
8 talking -- are your -- the Debtor's exhibits are at 2412. But  
9 Nate, I misplaced my notes. Where are Charitable DAF and  
10 Holdco's?

11 THE CLERK: I have 2411.

12 THE COURT: 2411? Is that it?

13 MR. BRIDGES: 2420, Your Honor.

14 THE COURT: 2420? Okay. Give me a minute. (Pause.)  
15 2420?

16 MR. BRIDGES: Yes, Your Honor.

17 THE COURT: Okay, I'm there. And it's which  
18 exhibits?

19 MR. BRIDGES: It's Exhibits 1 through 44, Your  
20 Honor, with four exceptions. We have agreed to withdraw  
21 Exhibit 2, 13, 14, and 29.

22 THE COURT: All right.

23 MR. BRIDGES: Also, Your Honor, we'd like to submit  
24 Debtor's Exhibit 1, which is under Exhibit 49 on our list,  
25 would be anything offered by the other side. But we'd like

1 to make sure that Debtor's Exhibit 1 gets in the record as  
2 well.

3 THE COURT: Let me back up. When I pull up the  
4 docket entry you just told me, I have Exhibits 44, 45, and 46  
5 only. Am I misreading this?

6 MR. BRIDGES: I have a chart showing Exhibits 1  
7 through 49 titled Docket 2420 filed 6/7/21.

8 THE COURT: Okay. The docket entry number you told  
9 me, 2420, it only has three exhibits: 44, 45, and 46. So,  
10 first off, I understand -- are you offering 45 and 46 or not?

11 MR. BRIDGES: No, Your Honor.

12 THE COURT: Okay. So you said you were offering 1  
13 through 44 minus certain ones. 44 is here.

14 MR. BRIDGES: Yes.

15 THE COURT: But I've got to go back to a different  
16 docket number.

17 THE CLERK: It's actually 2411.

18 THE COURT: It's at 2411. That has all the others?

19 THE CLERK: Yes.

20 THE COURT: Okay.

21 So, Mr. Pomerantz, do you have any objection to Exhibits  
22 1 through 44, which he's excepted out 2, 13, 14, and 29, and  
23 then he's added Debtor's Exhibit 1? Any objection?

24 MR. POMERANTZ: I don't believe so. I just would  
25 confirm with John Morris, who has been focused on the



1 exhibits, just to confirm.

2 THE COURT: Mr. Morris?

3 MR. MORRIS: No objection, Your Honor. It's fine.

4 THE COURT: Okay. They're admitted.

5 (Movants' Exhibits 1, 3 through 12, 15 through 28, and 30  
6 through 44 are received into evidence. Debtor's Exhibit 1 is  
7 received into evidence.)

8 THE COURT: So, any --

9 MR. BRIDGES: Thank you, Your Honor.

10 THE COURT: Anything you wanted to call to my  
11 attention about these?

12 MR. BRIDGES: Your Honor, the things that we  
13 mentioned in the argument, for sure, but especially that the  
14 word "trustee" is not used in the January hearing's  
15 transcript, nor is it under discussion in that transcript  
16 that it would be a trustee-like role being played by the  
17 Strand directors, as well as the transcript of the July  
18 hearing on the order at issue here, Your Honor, where you are  
19 asked to defer both in that transcript and in the motion, the  
20 motion that was at issue in that hearing, you are asked to  
21 defer to the business judgment of the company.

22 And finally, Your Honor, I'd ask you to look at the  
23 allegations in the District Court complaint.

24 THE COURT: All right.

25 Mr. Pomerantz or Morris, let's see what exhibits you're

1 wanting the Court to consider. Your exhibits, it looks like,  
2 are at Docket Entry 2412.

3 MR. MORRIS: As subsequently amended at 2423.

4 THE COURT: Oh. All right. So which ones are you  
5 offering?

6 MR. MORRIS: We're offering all of the exhibits on  
7 2423, which is 1 through 17.

8 (Echoing.)

9 THE COURT: Whoops. We got some distortion there.  
10 Say again?

11 MR. MORRIS: Yeah. All of the exhibits that are on  
12 2423, which are Exhibits 1 through 17. But I want to make  
13 sure that, as I did earlier, that that has the exhibits that  
14 we're relying on. Does that --

15 (Pause.)

16 THE COURT: Okay. Let me make sure I know what's  
17 going on here. You're double-checking your exhibits, Mr.  
18 Morris?

19 MR. MORRIS: Yes, Your Honor.

20 THE COURT: Okay.

21 (Pause.)

22 MR. MORRIS: Your Honor, we start with Docket No.  
23 2419, --

24 THE COURT: Okay.

25 MR. MORRIS: -- which was the amended exhibit list.

1 And that actually had Exhibits 1 through 17. And then that  
2 was amended at Docket 2423. So, the exhibits on both of  
3 those lists.

4 THE COURT: Well, they're one and the same, it looks  
5 like, right?

6 MR. MORRIS: Yes.

7 THE COURT: Okay. So you're offering those?

8 MR. MORRIS: I think -- yeah.

9 THE COURT: Any objection?

10 MR. BRIDGES: No objection.

11 THE COURT: All right. They're admitted.

12 (Debtor's Exhibits 1 through 17 are received into  
13 evidence.)

14 MR. POMERANTZ: Your Honor, if I may take a few  
15 moments to respond to Mr. Bridges' reply?

16 THE COURT: All right. Is he still within his hour  
17 and a half?

18 THE CLERK: At an hour and one minute.

19 THE COURT: Okay. All right. You have a little  
20 time left, so go ahead.

21 MR. POMERANTZ: Thank you, Your Honor.

22 So look, I -- it sort of was really not fair to us. Mr.  
23 Bridges was really making things up on the fly. He was  
24 changing the theories of his case and responding to Your  
25 Honor. But I'm going to do my best to respond to the

1 arguments made, many of which I sort of anticipated.

2 I'll first start with the issue that Your Honor raised,  
3 which was whether this is under Rule 60 or not. Mr. Bridges  
4 identified a couple of cases, said that the order was  
5 interlocutory, said that somehow the orders have anything to  
6 do with a plan confirmation order. They do not. Your Honor  
7 didn't hear that argument at the plan confirmation. The  
8 January 9th and July 16th orders are old and cold. There's  
9 an exculpation provision in the plan. There's a gatekeeper  
10 in the plan. The provisions do not overlap entirely. The  
11 gatekeeper applies prospectively. The exculpation provision  
12 includes additional parties.

13 So the arguments that basically the plan had anything to  
14 do -- and the fact that the plan is not a final order -- has  
15 anything to do with the January 9th and July 16th orders is  
16 just wrong. It's just wrong.

17 More fundamentally, Your Honor, as Your Honor pointed  
18 out, the *Smyth* case is a professional employment order. And  
19 ironically, if you abide by the *Smyth* case, that order is  
20 never appealable because it's interlocutory.

21 But more fundamentally, Your Honor, that's dealing with  
22 327 professionals. And again, there's not much analysis in  
23 the *Smyth* case, but we're not dealing with a 327  
24 professional. We're dealing with orders that were approved  
25 under 363.

1           So the premise of the argument that Rule 60(b) -- 60  
2           doesn't apply and they have other arguments just doesn't make  
3           any sense.

4           Okay. So now that gets us to Rule 60. And Your Honor,  
5           Your Honor hit the nail on the head. They haven't presented  
6           any evidence. Allegations in a complaint aren't evidence.  
7           They can't stand up there and say surprise evidence. They  
8           had the opportunity -- and this hearing's been continued a  
9           few weeks -- they had the opportunity to bring it up, and  
10          it's -- they had the opportunity to claim that there was  
11          surprise, but they just didn't. Okay?

12          So to go on to the Rule 60 arguments. Surprise.  
13          Surprise and reasonable delay are really -- go hand in hand  
14          with Mr. Bridges' argument. He says, well, we didn't find  
15          out that -- months after the order was entered that he  
16          violated a duty to us, so we are surprised by that, and it's  
17          a reasonable time. Well, Your Honor, the order provided for  
18          an exculpation. CLO Holdco and DAF knew that it applied to  
19          an exculpation. They were bound. They knew based upon that  
20          order that they would not be able to bring claims for normal  
21          negligence. There is no surprise.

22          If you take Mr. Bridges' argument to its conclusion, he  
23          could wait until the end of the statute of limitations after  
24          an order and have come in four years from now and say, Your  
25          Honor, we just found out facts so we should go back four

1 years before. That, Your Honor, that's not how the surprise  
2 works. That's not how the reasonable time works.

3 Mr. Bridges did not contest that they're bound by res  
4 judicata. He did not contest that the exculpation itself was  
5 clear and unambiguous. Of course he argued Your Honor  
6 couldn't enter an order saying there was exculpation, again,  
7 with no authority. And he seemed surprised, as I suspect he  
8 should, since he's not a bankruptcy lawyer, that retention  
9 orders, whether it's investment bankers, financial advisors,  
10 include exculpations all the time. So there's no grounds  
11 under surprise.

12 There's no grounds -- the motions are late under 60(c).

13 And they're not void. I went through a painstaking  
14 analysis, Your Honor, and I described in detail what the  
15 *Espinosa* case held, and the exceptional circumstances which  
16 Mr. Bridges tried to get away from as much as he could.  
17 Maybe he can try to get away from language in a district  
18 Court opinion, in a Bankruptcy Court opinion, in a Circuit  
19 Court opinion. You can't get away from language in a Supreme  
20 Court opinion. The Supreme Court opinion said exceptional  
21 circumstances, where there was arguably no basis for  
22 jurisdiction for what the Court did. They have not even come  
23 close to convincing Your Honor that there was absolutely no  
24 basis.

25 Now, they disagree. We granted, we think it's a good-

1 faith disagreement, but they haven't come close to  
2 establishing the *Espinosa* standard, so their motion under 60  
3 does not -- it fails.

4 And I don't think -- look, these are good lawyers. Mr.  
5 Bridges and Mr. Sbaiti are good lawyers. They didn't just  
6 inadvertently not mention Rule 60. They never mentioned it  
7 because they knew they had no claim under Rule 60.

8 Your Honor, Mr. Bridges has made comments about the  
9 fiduciary duty of Mr. Seery, about what the Investor's Act  
10 provides. He's just wrong on the law. Now, Your Honor  
11 doesn't have to decide that. Whichever court adjudicates the  
12 DAF lawsuit will have to decide it. But there is no private  
13 cause of action for damages. There are no fiduciary duties to  
14 the investors.

15 And what Mr. Bridges doesn't even mention, in that the  
16 investment agreement that's so prominent in his complaint,  
17 they waived claims other than willful misconduct and gross  
18 negligence against Highland. They waived those claims. So  
19 for Mr. Bridges to come in here and argue that there's some  
20 surprise, when he hasn't even bothered to look at the document  
21 that's underlying the contractual relationship between the DAF  
22 and the Debtor, is -- you know, I'll just say it's  
23 inadvertence.

24 Your Honor, Mr. Bridges tried to argue that Mr. Seery is  
25 not a beneficiary of the January 9th order. He's not an

1 agent. Well, again, Your Honor, Mr. Bridges wasn't there.  
2 Your Honor and we were. On January 9th, an independent board  
3 was picked, and at the time Mr. Dondero ceased to become the  
4 CEO. So you have three gentlemen coming in -- Mr. Seery, Mr.  
5 Dubel, and Mr. Nelms -- coming in to run Highland, in a very  
6 chaotic time. They had to act through their agents. There  
7 was no expectation that this board was going to actually run  
8 the day-to-day operations of the Debtor. Of course not. They  
9 needed someone to run. And they picked Mr. Seery. And the  
10 argument that well, he's an agent of the company, he's not an  
11 agent of the board, that just doesn't make sense. The  
12 independent board had to act. The directors had to act. And  
13 the directors, how do they deal with that? They acted through  
14 Mr. Seery. So he is most certainly governed by the January  
15 9th order.

16 Your Honor, I want to talk about the jury trial right.  
17 Mr. Bridges said that Paragraph 14 is an arbitration clause  
18 and not a jury trial waiver. Now, again, I will forgive Mr.  
19 Bridges because I assume he didn't read the provision, okay,  
20 and he -- somebody told him that, and that person just got it  
21 wrong. But what I would like to do is read for Your Honor  
22 Paragraph 14(f). It doesn't have to do with arbitration.  
23 It's a waiver of jury trial. 14(f), Jurisdiction Venue,  
24 Waiver of Jury Trial. The parties hereby agree that any  
25 action, claim, litigation, or proceeding of any kind



1 whatsoever against any other party in any way arising from or  
2 relating to this agreement and all contemplated transactions,  
3 including claims sounding in contract, equity, tort, fraud,  
4 statute defined as a dispute shall be submitted exclusively to  
5 the U.S. District Court for the Northern District of Texas, or  
6 if such court does not have subject matter jurisdiction, the  
7 courts of the State of Texas, City of Dallas County, and any  
8 appellate court thereof, defined as the enforcement court.

9 Each party ethically and unconditionally submits to the  
10 exclusive personal and subject matter jurisdiction of the  
11 enforcement court for any dispute and agrees to bring any  
12 dispute only in the enforcement court. Each party further  
13 agrees it shall not commence any dispute in any forum,  
14 including administrative, arbitration, or litigation, other  
15 than the enforcement court. Each party agrees that a final  
16 judgment in any such action, litigation, or proceeding is  
17 conclusive and may be enforced through other jurisdictions by  
18 suit on the judgment or in any manner provided by law.

19 And then the kick, Your Honor, all caps, as jury trial  
20 waiver always are: Each party irrevocably and unconditionally  
21 waives to the fullest extent permitted by law any right it may  
22 have to a trial by jury in any legal action, proceeding, cause  
23 of action, or counterclaim arising out of or relating to this  
24 agreement, including any exhibits, schedules, and appendices  
25 attached to this agreement or the transactions contemplated

1 hereby. Each party certifies and acknowledges that no  
2 representative of the owner of the other party has represented  
3 expressly or otherwise that the other party won't seek to  
4 enforce the foregoing waiver in the event of a legal action.  
5 It has considered the implications of this waiver, it makes  
6 this waiver knowingly and voluntarily, and it has been induced  
7 to enter into this agreement by, among other things, the  
8 mutual waivers and certifications in this section.

9 Your Honor, I will forgive Mr. Bridges. I assume he just  
10 did not read that. But to represent to the Court that that  
11 language does not contain a jury trial waiver is -- is just  
12 wrong.

13 THE COURT: All right. I'm going to stop right  
14 there. And you were reading from the Second Amended and  
15 Restated Shared Services Agreement between Highland --

16 MR. POMERANTZ: Not shared services. I'm reading  
17 from the Second Amended and Restated Investment Advisory  
18 Agreement --

19 THE COURT: Investment --

20 MR. POMERANTZ: -- between the Charitable DAF, the  
21 Charitable DAF GP, and Highland Capital Management. The  
22 agreement whereby the Debtor was the investment advisor to the  
23 Charitable DAF Fund and the Charitable DAF GP.

24 THE COURT: All right. Well, Mr. Bridges, I'm going  
25 to bounce quickly back to you. This is your chance to defend

1 your honor.

2 MR. BRIDGES: Yeah, we're -- we're looking at a  
3 different agreement, where -- where literally the words that  
4 were read to you are not in the agreement in front of us and  
5 it is news to me. So, Your Honor, this is a problem --

6 THE COURT: What is the agreement you're looking at?

7 MR. BRIDGES: It is the Amended -- I assume that  
8 means First Amended -- Restated Advisory Agreement.

9 MR. POMERANTZ: Your Honor, we are happy to file this  
10 agreement with the Court so the Court has the benefit of it in  
11 connection with Your Honor's ruling.

12 THE COURT: Okay. I would like you to do that. Uh-  
13 huh.

14 MR. BRIDGES: I'd like -- I'd like to request -- I'll  
15 withdraw that.

16 THE COURT: Okay. Go on, Mr. Pomerantz.

17 MR. POMERANTZ: Mr. Bridges, if you could put us on  
18 mute. If you could put us on mute, Mr. Bridges, so I don't  
19 hear your feedback. Thank you.

20 Mr. Bridges also complains about the language "to the  
21 extent permissible by law." As Your Honor knows and as has  
22 been my practice over 30 years, that language is probably in  
23 every plan where there's a retention of jurisdiction: to the  
24 extent permissible by law. And Mr. Bridges says that this  
25 will create ambiguity in the order that couldn't be enforced.

1 There's no basis for that. Our including the language "to the  
2 extent permissible by law" in the orders, as we are prepared  
3 to do, is consistent with the plan confirmation order where we  
4 addressed that issue. And we addressed that issue because we  
5 didn't want to put Your Honor in a position where thereby Your  
6 Honor may have an action before Your Honor that passes the  
7 colorability gate that Your Honor may not be able to assert  
8 jurisdiction. And since jurisdiction can't be waived in that  
9 regard, we will agree to amend that.

10 There's nothing ambiguous about that, and there's no  
11 reason, though, that clause has to modify the Court's ability  
12 to act as a gatekeeper, because, as we've argued *ad nauseam*,  
13 gatekeeper provisions where the Court has that ability is not  
14 only part of general bankruptcy jurisprudence but also part of  
15 the Bankruptcy Code.

16 Counsel says that *Barton* doesn't apply because the  
17 business judgment of Your Honor was used in retaining Mr.  
18 Seery as opposed to in some other capacity. There's no basis  
19 for that, Your Honor. A court-appointed -- a court-approved  
20 CEO, CRO, professional, they are all entitled to protection  
21 under the *Barton* act. And the argument -- and again, this is  
22 separate and apart from whether he's entitled to protection  
23 under the January 9th order. But the argument that because it  
24 was the business judgment -- again, business judgment in doing  
25 something that Your Honor expressly contemplated under the

1 January 9th corporate governance order -- there's just no law  
2 to support that. And I guess he's trying to get around the  
3 plethora of cases that deal with the situation where *Barton*  
4 has been extended.

5 Your Honor, Mr. Bridges, again, in arguing that we're  
6 ships passing in the night on *Shoaf* and *Applewood* and  
7 *Espinosa*, no, we're not ships passing in the night. We have a  
8 difference in agreement on what these cases stand for. These  
9 cases stand for the proposition that a clear and unambiguous  
10 provision, plain and simple, if it's clear and unambiguous, it  
11 will be given res judicata effect. The release in *Shoaf*,  
12 clear and unambiguous. The release in *Applewood*, not. The  
13 issue here is the exculpation language. That was clear and  
14 unambiguous. It applied prospectively. The argument makes no  
15 sense that we didn't identify -- we didn't identify claims  
16 that might arise in the future, so therefore an exculpation  
17 clause doesn't apply? That doesn't make any sense.

18 Your Honor clearly exculpated parties. Mr. Dondero knew  
19 it. CLO Holdco knew it. The DAF knew it. So the issue Your  
20 Honor has to decide is whether that exculpation was a clear  
21 and unambiguous provision such that it should be entitled to  
22 res judicata effect. And we submit that the answer is  
23 unequivocally yes.

24 That's all I have, Your Honor.

25 THE COURT: All right. Well, --

1 MR. MORRIS: Your Honor? I apologize.

2 THE COURT: Okay.

3 MR. MORRIS: This is John Morris.

4 THE COURT: Yes?

5 MR. MORRIS: I just want to, with respect to the  
6 exhibits, I know there was no objection, but I had cited to  
7 Docket Nos. 2419 and 2423. The original exhibit list is at  
8 Docket No. 2412. So it's the three of those lists together.  
9 2412, as amended by 2419, as amended by 2423. Thank you very  
10 much.

11 THE COURT: All right. Thank you. All right.

12 MR. BRIDGES: Your Honor, I still have no objection  
13 to that, but may I have the last word on my motion?

14 THE COURT: Is there time left?

15 THE CLERK: Yes.

16 THE COURT: Okay. Go ahead.

17 MR. BRIDGES: I just need a minute, Your Honor. They  
18 agreed to change the order. They proposed it to us. They  
19 proposed it in a proposed order to you. They can't also say  
20 that it cannot be changed.

21 Secondly, Your Honor, in *Milic v. McCarthy*, 469 F.Supp.3d  
22 580, the Eastern District of Virginia points out that the  
23 Fourth Circuit treats appointment of estate professionals as  
24 interlocutory orders as well.

25 That's all. Thank you, Your Honor.

1 THE COURT: All right. Here's what we're going to  
2 do. We've been going a very long time. I'm going to take a  
3 break to look through these exhibits, see if there's anything  
4 in there that I haven't looked at before and that might affect  
5 the decision here. So we will come back at 3:00 o'clock  
6 Central Time -- it's 2:22 right now -- and I will give you my  
7 bench ruling on this. All right.

8 So, Mike, they can all stay on the line, right?

9 Okay. You can stay on, and we'll be back at 3:00 o'clock.

10 THE CLERK: All rise.

11 (A recess ensued from 2:22 p.m. to 3:04 p.m.)

12 THE CLERK: All rise.

13 THE COURT: All right. Please be seated. All right.  
14 Everyone presented and accounted for. We're going back on the  
15 record.

16 MR. POMERANTZ: Your Honor, before you start, this is  
17 Jeff Pomerantz. We had sent to your clerk, and hopefully it  
18 got to you, a copy of the Second Amended and Restated  
19 Investment Advisory Agreement. We also copied Mr. Sbaiti with  
20 it as well. And we would also like to move that into  
21 evidence, just so that it's part of the Court's record.

22 THE COURT: All right.

23 MR. BRIDGES: We would object to that, Your Honor.  
24 We haven't had an opportunity to even verify its authenticity  
25 yet.

1           THE COURT: All right. Well, I'll tell you what.  
2 I'm going to address this in my ruling. So it's not going to  
3 be part of the record for this decision, and yet -- well, I'll  
4 get to it.

5           All right. So we're back on the record in Case Number 19-  
6 34054, Highland Capital. The Court has deliberated, after  
7 hearing a lot of argument and allowing in a lot of documentary  
8 evidence, and the Court concludes that the motion of CLO  
9 Holdco, Ltd. and The Charitable DAF to modify the retention  
10 order of James Seery, which was entered almost a year ago, on  
11 July 16th, 2020, should be denied.

12           This is the Court's oral bench ruling, but the Court  
13 reserves discretion to supplement or amend in a more fulsome  
14 written order what I'm going to announce right now, pursuant  
15 to Rule 7052.

16           First, what is the Movants' authority to request the  
17 modification of a bankruptcy court order that has been in  
18 place for so many months, which was issued after reasonable  
19 notice to the Movants, and after a hearing, which was not  
20 objected to by the Movants, or appealed, when the Movants were  
21 represented by sophisticated counsel, I might add, and which  
22 order was relied upon by parties in this case, most notably  
23 Mr. Seery and the Debtor, and in fact was entered after  
24 significant negotiations involving a sophisticated court-  
25 appointed Unsecured Creditors' Committee with sophisticated



1 professionals and sophisticated members, and after negotiation  
2 with an independent board of directors, court-appointed, one  
3 of whose members is a retired bankruptcy judge? What is the  
4 Movants' authority?

5 Movants fumbled a little on that question, in that the  
6 exact authority wasn't set forth in the motion. But Movants'  
7 primary argument is that Movants think the Seery retention  
8 order was an interlocutory order and that the Court simply has  
9 the inherent authority to modify it as an interlocutory order.

10 The Court disagrees with this analysis. I do not think  
11 the Fifth Circuit's *Smyth* case dictates that the Seery  
12 retention order is still interlocutory. The Seery retention  
13 order was an order entered pursuant to Section 363 of the  
14 Bankruptcy Code, not a Section 327 professionals to a debtor-  
15 in-possession, professionals to a trustee employment order  
16 such as the one involved in the *Smyth* case.

17 But even if the Seery retention order is interlocutory --  
18 the Court feels strongly that it's not, but even if it is --  
19 the Court believes it would be an abuse of this Court's  
20 inherent discretion or authority to modify that order almost a  
21 year after the fact and under the circumstances of this case.

22 Now, assuming Rule 60(b) applies to the Movants' request,  
23 the Court determines that the Movants have not made their  
24 motion anywhere close to within a reasonable time, as Rule  
25 60(c) requires, nor do I think the Movants have demonstrated

1 any exceptional circumstances to declare the order or any of  
2 its provisions void. The Movants have put on no evidence that  
3 constitutes surprise or constitutes newly-disputed evidence.  
4 So why are there no exceptional circumstances here such that  
5 the Court might find, you know, a void order or void  
6 provisions of an order?

7 First, this Court concludes that there's no credible  
8 argument that the Court overreached its jurisdiction with the  
9 gatekeeping provisions in the order. Gatekeeping provisions  
10 are not only very common in the bankruptcy world -- in  
11 retention orders and in plan confirmation orders, for example  
12 -- but they are wholly consistent with the *Barton* case, the  
13 U.S. Supreme Court's *Barton's* case, and its progeny that has  
14 become known collectively as the *Barton* doctrine. Gatekeeping  
15 provisions are wholly consistent with 28 U.S.C. Section  
16 959(a)'s complete language.

17 The Fifth Circuit has blessed gatekeeping provisions in  
18 all sorts of contexts. It has blessed them in the situation  
19 of when *Stern* claims are involved in the *Villegas* case. It  
20 even blessed Bankruptcy Courts' gatekeeping functions a long  
21 time ago, in 1988, in a case that I don't think anyone  
22 mentioned in the briefing, but as I've said, my brain  
23 sometimes goes down trails, and I'm thinking of the *Louisiana*  
24 *World Exposition* case in 1988, when the Fifth Circuit blessed  
25 there a procedure where an unsecured creditors' committee can

1 bring causes of action against persons, such as officers and  
2 directors or other third parties, if they first come to the  
3 Bankruptcy Court and show a colorable claim. They have to  
4 come to the Bankruptcy Court, show they have a colorable claim  
5 and they're the ones that should be able to pursue them. Not  
6 exactly on point, but it's just one of many cases that one  
7 could cite that certainly approve gatekeeper functions of  
8 various sorts of Bankruptcy Courts.

9 It doesn't matter which court might ultimately adjudicate  
10 the claims; the Bankruptcy Court can be the gatekeeper.

11 And the Court agrees with the many cases cited from  
12 outside this circuit, such as the case in Alabama, in the  
13 Eleventh Circuit, and there was another circuit-level case, at  
14 least one other, that have held that the *Barton* doctrine  
15 should be extended to other types of case fiduciaries, such as  
16 debtor-in-possession management, among others.

17 Finally, as I pointed out in my confirmation ruling in  
18 this case, gatekeeping provisions are commonplace for all  
19 types of courts, not just Bankruptcy Courts, when vexatious  
20 litigants are involved. I have commented before that we seem  
21 to have vexatious litigation behavior with regard to Mr.  
22 Dondero and his many controlled entities.

23 Now, as far as the Movants' argument that there was not  
24 just improper gatekeeping provisions but actually an improper  
25 discharge in the Seery retention order of negligence claims or

1 other claims that don't rise to the level of gross negligence  
2 or willful misconduct, again, I reiterate there's nothing  
3 exceptional in the bankruptcy world about exculpation  
4 provisions like this. They absolutely are a term of  
5 employment very often. Just like compensation, they're  
6 frequently requested, negotiated, and approved. They are  
7 normal in the corporate governance world, generally. They are  
8 normal in corporate contracts between sophisticated parties.  
9 And most importantly of all, even if this Court overreached  
10 with the exculpation provisions in the Seery retention order,  
11 even if it did, res judicata bars the attack of these  
12 provisions at this late stage, under cases such as *Shoaf*,  
13 *Republic Supply v. Shoaf* from the Fifth Circuit, the *Espinosa*  
14 case from the U.S. Supreme Court, and even *Applewood*, since  
15 the Court finds the language in this order was clear,  
16 specific, and unambiguous with regard to the gatekeeping  
17 provisions and the exculpation provisions.

18 Last, and this is the part where I said I'm going to get  
19 to this agreement that has been submitted, the Second Amended  
20 and Restated Investment Advisor Agreement or whatever the  
21 title is. I am more than a little disturbed that so much of  
22 the theme of the Movants' pleadings and arguments, and I think  
23 even representations to the District Court, have been they  
24 have these sacred jury trial rights, these inviolate jury  
25 trial rights, and an Article I Court like this Court should

1 have no business through a gatekeeping provision impinging on  
2 the possible pursuit of an action where there's a jury trial  
3 right.

4 I was surprised initially when I thought about this. I  
5 thought, wow, I've seen so many agreements over the months. I  
6 can't say every one of them waived the jury trial right, but I  
7 just remembered seeing that a lot, and seeing arbitration  
8 provisions, and so that's why I asked. It just was lingering  
9 in my brain. So I'm going to look at what is submitted. I'm  
10 not relying on that as part of my ruling. As you just heard,  
11 I had a multi-part ruling, and whether there's a jury trial  
12 right or not is irrelevant to how I'm choosing to rule on this  
13 motion. But I do want to see the agreement, and then I want  
14 Movants within 10 days to respond with a post-hearing trial  
15 brief either saying you agree that this is the controlling  
16 document or you don't agree and explain the oversight, okay?  
17 Because it feels like a gross omission here to have such a  
18 strong theme in your argument -- we have a jury trial right,  
19 we have a jury trial right, by God, the gatekeeping  
20 provisions, among other things, impinge on our sacred pursuit  
21 of our jury trial right -- and then maybe it was very  
22 conspicuous in the controlling agreement that you'd waived  
23 that, the Movants had waived that.

24 So, anyway, I'm requiring some post-hearing briefing, if  
25 you will, on whether omissions, misrepresentations were made

1 to the Court.

2 Anyway, so I reserve the right to supplement or amend this  
3 ruling with a more fulsome written order. I am asking Mr.  
4 Pomerantz to upload a form of order that is consistent with  
5 this ruling, and --

6 MR. POMERANTZ: Your Honor, we will do so. I do have  
7 one thing to bring to the Court's attention, unrelated to the  
8 motion, before Your Honor leaves the bench.

9 THE COURT: All right. So just a couple of follow-up  
10 things. Have you -- I'm not clear I heard what you said about  
11 this agreement. Did you email it to my courtroom deputy or  
12 did you file it on the docket?

13 MR. POMERANTZ: We emailed it to your courtroom  
14 deputy. We're happy to file it on the docket. And we also  
15 provided a copy to Mr. Sbaiti.

16 I would note for the Court that it's signed both by The  
17 Charitable DAFs by Grant Scott, just for what it's worth.

18 THE COURT: Okay. All right. Well, I'm trying to  
19 think what I want -- I do want you to file it on the docket,  
20 and I'm trying to think of what you label it. Just call it  
21 Post-Hearing Submission or something and link it to the motion  
22 that we adjudicated here today. And then, again, you've got  
23 10 days, Mr. Bridges, to say whatever you want to say about  
24 that agreement.

25 I guess the last thing I wanted to say is we sure devoted

1 a lot of time to this motion today. We have -- this is a  
2 recurring pattern, I guess you can say. We have a lot of  
3 things that we devote a lot of time to in this case that I get  
4 surprised, but it is what it is. You file a motion. I'm  
5 going to give it all the attention Movants and Respondents  
6 think it warrants. I'm going to develop a full record,  
7 because, you know, there's a recurring pattern of appeals  
8 right now, 11 or 12 appeals, I think, not to mention motions  
9 to withdraw the reference. If we're going to have higher  
10 courts involved in the administration of this case, I'm going  
11 to make a very thorough record so nobody is confused about  
12 what we did, what I considered, what my reasoning was.

13 So I kind of think it's unfortunate for us to have to  
14 spend case resources and so much time and fees on things like  
15 this, but I'm going to make sure a Court of Appeals is not  
16 ever confused about what happened and what we did. So that's  
17 just the way it's going to be. And I feel like we have no  
18 choice, given, again, the pattern of appeals.

19 All right. So, with that, Mr. Pomerantz, you had one  
20 other case matter, you said?

21 MR. POMERANTZ: Yes. But before I get to that, Your  
22 Honor, I assume that, in response to the Movants' submission  
23 on the agreement, that we would have right at four or seven  
24 days to respond if we deem it's appropriate?

25 THE COURT: I think that's reasonable. That's

1 reasonable.

2 MR. POMERANTZ: Okay. Thank you, Your Honor.

3 THE COURT: So let me think of how I want to do this.  
4 I'll just do a short scheduling order of sorts that just, it  
5 says in one or two paragraphs, at the hearing on this motion,  
6 the Court raised questions about the jury trial rights and the  
7 Debtor has now submitted the controlling agreements, I'm  
8 giving the Movants 10 days to respond to whether this is  
9 indeed a controlling agreement, and why, if it is, the Movants  
10 have heretofore taken the position they have jury trial  
11 rights. And then I will give you seven days thereafter to  
12 reply, and then the Court will set a further status conference  
13 if it determines it's necessary. Okay?

14 So, Nate, we'll do a short little order to that effect.  
15 Okay?

16 MR. POMERANTZ: Thank you, Your Honor.

17 I -- again, before I raise the other issue, I want to pick  
18 up on a comment Your Honor just made towards the end. I know  
19 the Court has been frustrated with the time and effort we've  
20 been spending. The Debtor and the creditors have been  
21 extremely frustrated, because in addition to the time and  
22 effort everyone's spending, we're spending millions of  
23 dollars, millions of dollars on litigation that --

24 THE COURT: It's one of the reasons you needed an  
25 exit loan, right?



1 MR. POMERANTZ: Right. No, exactly. That's  
2 frivolous, that we think is made in bad faith.

3 And Your Honor, and everyone else who's hearing this on  
4 behalf of Mr. Dondero, should understand we're looking into  
5 what appropriate authority Your Honor would have to shift some  
6 of the costs. Your Honor did that in the contempt motion.  
7 Your Honor can surely do that in connection with the notes  
8 litigation. But all this other stuff that is requiring us to  
9 spend hundreds and hundreds of hours and spend millions of  
10 dollars, we are clearly looking into whether it would be  
11 appropriate and what authority there is. I just wanted to let  
12 Your Honor know that.

13 And in connection with that, the last point, Your Honor, I  
14 can't actually even believe I'm saying this, but there was  
15 another lawsuit filed -- we just found out in the break -- on  
16 Wednesday night by the Sbaiti firm on behalf of Dugaboy in the  
17 District Court.

18 Now, to make matters worse, Your Honor, the litigation  
19 relates to alleged improper management by the Debtor of Multi-  
20 Strat. If Your Honor will recall, at many times I've told  
21 this Court what Dugaboy's claims they filed in this case.  
22 Dugaboy has a claim that is filed in this case for  
23 mismanagement postpetition of Multi-Strat. Now the Sbaiti  
24 firm, in addition to representing CLO Holdco, in addition to  
25 representing the DAF, and whatever the Plaintiffs' lawyers are

1 in that other District Court, PCMG, and in connection with the  
2 Acis matter, they've decided they haven't had enough. They've  
3 now filed another motion that -- you know, why they filed it  
4 in District Court and there's a proof of claim on the same  
5 issues, I don't know. But I thought Your Honor should know.  
6 I'm not asking Your Honor to do anything about it. But we  
7 will act aggressively, strongly, and promptly.

8 Thank you, Your Honor.

9 THE COURT: All right. Well, you've reminded me of  
10 what came out earlier today about the entity -- I left my  
11 notepad in my chambers -- PMC or PMG or something.

12 Mr. Bridges, we're not going to have a hearing right now  
13 on me doing anything, but what are you thinking? What are you  
14 doing?

15 MR. BRIDGES: Your Honor, I'm not trying to duck your  
16 question. I literally have no involvement with any other  
17 claim, and we would have to ask Mr. Sbaiti to answer your  
18 questions.

19 THE COURT: All right. Is he there?

20 MR. BRIDGES: He is.

21 THE COURT: I'll listen.

22 MR. BRIDGES: I'll switch seats and give him this  
23 chair.

24 MR. SBAITI: Sorry, Your Honor. We had two computers  
25 going and weren't able to use the sound on one, so we ended up

1 turning that off.

2 Your Honor, I'm not sure what the question is about when  
3 you say what are we thinking. We have a client that's asked  
4 us to file something, and when we're advised by bankruptcy  
5 counsel that it's not prohibited for us to do so, and don't  
6 know why we're precluded from doing so, and when the time  
7 comes I'm sure we'll be able to explain to Your Honor --  
8 someone will be able to explain to Your Honor why what we're  
9 doing, despite Mr. Pomerantz's exacerbation, or excuse me,  
10 exasperation, why that wasn't improper. It's our belief that  
11 it wasn't improper or a violation of the Court's rule.

12 THE COURT: Just give me a quick shorthand *Readers'*  
13 *Digest* of why you don't think it's improper.

14 MR. SBAITI: Sure. My understanding is, Your Honor,  
15 there's not a rule that says we can't file it against the  
16 Debtor for postpetition actions. So that, that's as -- that's  
17 as much as I understand. And I'm going to -- I'm not trying  
18 to duck it, either. And if I'm wrong about that and someone  
19 wants to correct me on our side offline and if we have to  
20 explain to the Court why that's so or what rule has been  
21 violated, I'm sure we'll be able to put together something for  
22 that. But that's what I've been advised.

23 THE COURT: Have you done thorough --

24 MR. POMERANTZ: Your Honor, I think what --

25 MR. SBAITI: (garbled), Your Honor.

1 THE COURT: Have you done thorough research yourself?  
2 Your Rule 11 signature is on the line, not some bankruptcy  
3 counsel you talked to. Have you done the research yourself?

4 MR. SBAITI: Well, Your Honor, I've relied on the  
5 research and advice of people who are experts, and I believe  
6 my Rule 11 obligations also allow me to do that, so yes.

7 MR. POMERANTZ: Your Honor, I think we're entitled to  
8 know if it's Mr. Draper's firm who has been representing  
9 Dugaboy. He's the bankruptcy counsel. I don't think it's an  
10 attorney-client privilege issue. If Mr. Sbaiti is going to be  
11 here and sort of say, hey, bankruptcy counsel said it was  
12 okay, I think we would like to know and I'm sure Your Honor  
13 would like to know who is that bankruptcy counsel.

14 THE COURT: Yes. Fair enough. Mr. Sbaiti?

15 MR. SBAITI: Your Honor, in consultation with Mr.  
16 Draper and with consultation with other counsel that we've  
17 spoken to, that has been our understanding.

18 THE COURT: Who's the other counsel?

19 MR. SBAITI: Well, we've talked to Mr. Rukavina about  
20 some of these things for the PCMG and the Acis case. We've  
21 talked to the people who, when they tell us you can't do this  
22 because they're bankruptcy counsel for our client, then we  
23 don't do something. So, and I'm not trying to throw anybody  
24 under the bus, but my understanding of what goes on in  
25 Bankruptcy Court is incredibly limited, so, you know, and if

1 it's a mistake then I'll own it, if I have a mistaken  
2 understanding, but I also wasn't anticipating having to make a  
3 presentation about this right here right now, so --

4 THE COURT: Well, you're filing lawsuits that involve  
5 this bankruptcy case during the hearing, so --

6 MR. SBAITI: Oh, we didn't file it during the  
7 hearing, Your Honor. It was filed last night, I believe.

8 THE COURT: Okay. Well, I assume that you're going  
9 to go back and hit the books, hit the computer, and be  
10 prepared to defend your actions, because your bankruptcy  
11 experts, they may think they know a lot, but the judge is not  
12 very happy about what she's hearing.

13 MR. POMERANTZ: Your Honor, if I may ask when Your  
14 Honor intends to issue the contempt ruling in connection with  
15 the June 8th hearing? I strongly believe -- and, obviously,  
16 this has nothing to do with the contempt hearing; this  
17 happened after -- but I strongly believe that sending a  
18 message that Your Honor is inclined to hold counsel in  
19 contempt, which obviously is one of the violators we said  
20 should be held in contempt, it may be important to do that  
21 sooner rather than later so that people know that Your Honor  
22 is serious.

23 THE COURT: All right. Well, I understand and  
24 respect that request. And let me tell you all, I had a seven-  
25 day -- okay. You all were here on that motion June 8th. I

1 had a seven-day, all-day, every-day, 9:00 to 5:00, 45-minute  
2 lunch break, in-person hearing with a dozen or so live  
3 witnesses that I just finished Tuesday at 5:00 o'clock. So  
4 you all were here on the 8th, and then -- what day was that --  
5 what was -- Tuesday, I finished. Tuesday was the 22nd. So I  
6 started on the 14th, okay? So you all were here on the 8th  
7 and I had a live jury trial -- I mean, not jury trial, a live  
8 bench trial -- live human beings in the courtroom, beginning  
9 June 14th. So you're here the 8th. June 14th through 22nd, I  
10 did my trial. And here we are on the 25th. And guess what, I  
11 have another live human-being bench trial next week, Monday  
12 through Friday.

13 So we've been working in other things like this in between  
14 those two. So I'm telling you that not to whine, I'm just  
15 telling you that, that's the only reason I didn't get out a  
16 quick ruling on this, okay?

17 MR. POMERANTZ: And Your Honor, I was not at all  
18 making that comment to imply anything about the Court.

19 THE COURT: Well, --

20 MR. POMERANTZ: The time and effort that you have  
21 given to this case is extraordinary, --

22 THE COURT: Okay.

23 MR. POMERANTZ: -- so please don't misunderstand my  
24 comment.

25 THE COURT: Okay. And I didn't mean to express

1 annoyance or anything like that. I guess what I'm trying to  
2 do is I don't want anyone to mistake the delay in ruling on  
3 the contempt motion to mean I'm just not that -- you know, I'm  
4 not prioritizing it, other things are more serious to me or  
5 important to me, or I'm going to take two months to get to it.  
6 It's literally been I've been in trial almost all day long  
7 every day since you were here. But trust me, I'm about as  
8 upset as upset can be about what I heard on June 8th, and I'm  
9 going to get to that ruling, and I know what I'm going to do.  
10 And, well, like I said, it's just a matter of figuring out  
11 dollars and whom, okay? There's going to be contempt. I just  
12 haven't put it on paper because I've been in court all day and  
13 I haven't come up with a dollar figure. Okay?

14 So I hope -- I don't know if that matters very much, but  
15 it should.

16 All right. We stand adjourned.

17 (Proceedings concluded at 3:35 p.m.)

18 --oOo--

19

20 CERTIFICATE

21 I certify that the foregoing is a correct transcript from  
22 the electronic sound recording of the proceedings in the  
above-entitled matter.

23 **/s/ Kathy Rehling**

**06/29/2021**

24

25 \_\_\_\_\_  
Kathy Rehling, CETD-444  
Certified Electronic Court Transcriber

\_\_\_\_\_  
Date

004544

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## **EXHIBIT 22**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS (DALLAS)

IN RE:	.	Case No. 19-34054-11 (SGJ)
	.	
HIGHLAND CAPITAL	.	
MANAGEMENT, L.P.,	.	
	.	
Debtor.	.	
. . . . .	.	
	.	Adv. No. 21-03067 (SGJ)
CHARITABLE DAF FUND, LP,	.	
et al.,	.	
	.	
Plaintiffs,	.	Earle Cabell Federal Building
	.	1100 Commerce Street
v.	.	Dallas, Texas 75242
	.	
HIGHLAND CAPITAL,	.	
MANAGEMENT, L.P., et al.,	.	
	.	
Defendants.	.	Tuesday, November 23, 2021
. . . . .	.	9:40 a.m.

TRANSCRIPT OF HEARING ON  
PLAINTIFFS' MOTION TO STAY ALL PROCEEDINGS (55);  
PLAINTIFFS' MOTION TO STRIKE REPLY APPENDIX (47); AND  
DEFENDANTS' MOTION TO DISMISS COMPLAINT (26)

**BEFORE HONORABLE STACEY G. JERNIGAN**  
**UNITED STATES BANKRUPTCY COURT JUDGE**

TELEPHONIC APPEARANCES CONTINUED ON NEXT PAGE.

Audio Operator: Hawaii S. Jeng

Proceedings recorded by electronic sound recording, transcript  
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004547

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1 THE COURT: Good morning. Please be seated.

2 All right. We have a setting in the Charitable DAF  
3 Fund, et al., v. Highland, Adversary 21-3067. We have three  
4 motions that are set.

5 Let me get appearances from the Plaintiffs' counsel  
6 first. Go ahead.

7 MR. SBAITI: Good morning, Your Honor. This is Mazin  
8 Sbaiti for the Plaintiffs.

9 THE COURT: Okay. Thank you.

10 Now for the Defendants, who do we have appearing?

11 MR. POMERANTZ: Good morning, Your Honor. It's Jeff  
12 Pomerantz and John Morris from Pachulski Stang Ziehl & Jones.  
13 Your Honor, before -- I understand Your Honor is going to take  
14 up the motion to stay first.

15 Before Your Honor does so, I have a procedural issue  
16 relating to that motion that I would like to address the Court  
17 after appearances are made.

18 THE COURT: All right. I assume that's all the  
19 lawyer appearances for this adversary.

20 MR. JORDAN: Your Honor?

21 THE COURT: Oh, go ahead.

22 MR. JORDAN: Your Honor, we are a nominal defendant,  
23 but John Jordan on behalf of Highland CLO Funding, Ltd.

24 THE COURT: Okay. Thank you. Sorry about that.

25 MR. BESSETTE: And, Your Honor, Paul Bessette, Mr.

1 Jordan's colleague is on the phone, as well.

2 THE COURT: Okay. Thank you.

3 All right. Anyone else I missed?

4 (No audible response)

5 THE COURT: All right. Mr. Pomerantz, your  
6 procedural issue?

7 MR. POMERANTZ: Thank you, Your Honor.

8 Your Honor, I must once again bring to this Court's  
9 attention a violation of the Court Rules by the various counsel  
10 representing Mr. Dondero. This time it's by Mr. Sbaiti.

11 When the district court entered its order granting  
12 Highland's motion to enforce the reference and referring this  
13 matter to Your Honor, there were three matters on the Court's  
14 docket, district court's docket that got transferred. First  
15 was the motion to dismiss, second was the motion to stay, and  
16 third was the motion to strike, which essentially has been  
17 rendered moot.

18 The briefing was complete with respect to the first  
19 two matters, the motion to dismiss and the motion to stay. And  
20 all that remained for the Court to do was to set a hearing and  
21 have oral argument. Your Honor, on October 13th, Your Honor  
22 set a hearing for today for each of those two motions.  
23 Nevertheless, on November 10th, almost a month after the Court  
24 set the matters for hearing and after pleadings were closed,  
25 Plaintiffs filed what they called their amended motion to stay.

1           As an initial matter, Your Honor, the amended motion  
2 was not even filed in this adversary proceeding initially. It  
3 was filed in the main case, and there was an error that Mr.  
4 Sbaiti corrected on November 18th, five days before this  
5 hearing. Plaintiff did not ask for leave of court to file any  
6 further pleadings. They did not provide the time under the  
7 local rules for response. And, in fact, they raised additional  
8 arguments in their amended motion.

9           Well, Your Honor, we can certainly argue to the Court  
10 that the amended motion constitutes a new motion, is untimely,  
11 and the hearing should be continued to allow us to file a  
12 response. We're not going to do that, Your Honor. As I will  
13 discuss when it's my time to response substantively to the  
14 motion, the new arguments to stay the proceedings, the amended  
15 motion are equally as frivolous as the arguments contained in  
16 the original motion.

17           But I bring this to the Court's attention because,  
18 again, it's extremely frustrating to have the lawyers  
19 representing Mr. Dondero's related entities continue to act as  
20 if the rules do not apply to them. Your Honor will recall just  
21 a week or so ago, Your Honor made a -- we had a similar issue  
22 in connection with the motion to dismiss. Failure to follow  
23 the rules is unprofessional, and it's disrespectful not only to  
24 Highland's professionals but also to the Court and it  
25 interferes with Your Honor's ability to control your docket and

1 sufficiently prepare for contested matters.

2 At some point, Your Honor, there should be real  
3 consequences for the continued violation of the rules. Having  
4 said that, Your Honor, we are prepared to go forward with the  
5 motion to stay today.

6 THE COURT: All right. Mr. Sbaiti, what say you?  
7 I'm looking at Docket Entry Number 69 in the adversary  
8 proceeding that was filed last Thursday. So, obviously, very,  
9 very late in the game, shall we say. What is your response to  
10 this?

11 MR. SBAITI: Your Honor, that was not filed in the  
12 adversary as an error. When we asked one of our paralegals to  
13 file it, we're not as familiar with the bankruptcy court system  
14 and it was an error. It was corrected once the lawyers  
15 realized it, which was last -- which was on November the 18th.  
16 It was filed in, I guess in the main case. But it was simply  
17 an inadvertent error, Your Honor.

18 MR. POMERANTZ: I would add, Your Honor, the original  
19 motion filed inadvertently was November 10th. It still was not  
20 timely. I think Mr. Sbaiti needs to answer the question of why  
21 that was filed untimely, okay.

22 THE COURT: All right. Thank you, Mr. Sbaiti.

23 So, one of my pet peeves in life is people blaming  
24 paralegals, by the way. But be that as it may, as Mr.  
25 Pomerantz points out that it was still untimely the motion



1 filed in the underlying bankruptcy case November 10th. So what  
2 is your --

3 MR. SBAITI: Your Honor, when we looked at the motion  
4 and looked at the progression of the case, we filed an amended  
5 motion simply to clarify our position. And really I don't  
6 think we've changed our arguments all that much. We simply  
7 clarified our position. We've seen amended motions filed in  
8 the bankruptcy in our prior dealings, and so at that point, we  
9 felt like there wasn't a rule explicitly saying we couldn't  
10 have an amended motion.

11 But if it's untimely, Your Honor, you know, we don't  
12 think it changes the underlying arguments. As Mr. Pomerantz  
13 said, we don't think there's any prejudice to Highland either.

14 THE COURT: All right. Well, just to be clear, you  
15 know, it's one thing in an underlying bankruptcy case to file  
16 an amended motion after you've gotten a motion set for hearing  
17 that might slightly adjust, you know, facts or relief sought.  
18 And, of course, we independently look at it when it happens in  
19 an underlying case to see do we need more notice to affected  
20 parties.

21 But in an adversary proceeding, you know, you just  
22 don't do this. All right? If you have some sort of  
23 exceptional circumstances, you can file I guess a motion to  
24 amend because I got to include this new information that didn't  
25 exist. But you just don't do this, okay?

1           So I don't -- could you be clear what was the new  
2 information? What was the new information that had to be  
3 brought before the Court suddenly?

4           MR. SBAITI: Your Honor, there wasn't new  
5 information. We were simply giving notice of our understanding  
6 of where the legal arguments were going. The reason being is  
7 that after those motions were filed and recently, the debtor  
8 took the position in two other cases that they should be  
9 dismissed pursuant to the permanent injunction.

10           And so that clarified for us at least a couple of  
11 arguments that were unclear to us where the debtor stood on  
12 whether or not the permanent injunction would be a basis to  
13 dismiss or stay any of the claims that were pending. There are  
14 two other claims pending in district court. Since we had filed  
15 that motion, the debtor filed a motion to reconsider the stays  
16 that were granted in those two courts. And then they also  
17 moved to dismiss on the basis of the permanent injunction.

18           And so given that the debtor took the position that  
19 they were willing to dismiss those cases based upon the  
20 permanent injunction, it in many ways contravenes the position  
21 they took in response to our motion which is that the -- for  
22 example, they somewhat take the position in Paragraph 22, it  
23 wasn't as clear then but it's clear -- it seems clearer now  
24 that the permanent injunction is not relevant to whether or not  
25 the case can go forward in any capacity.

1 And so we simply wanted to incorporate that, but it's  
2 mainly legal argument about the choices that are before the  
3 Court. That was really it. I mean, theoretically, I would  
4 have made them for the first time during oral argument and we  
5 thought we were doing something good by giving -- apprising the  
6 Court in writing and giving notice of these arguments to the  
7 other side by filing an amended motion. We didn't add new  
8 evidence or anything like that.

9 MR. POMERANTZ: Your Honor, that argument is  
10 completely disingenuous because our motion to dismiss and  
11 motion for reconsideration that Mr. Sbaiti refers to is several  
12 weeks ago, okay. It wasn't November 10th. It was several  
13 weeks ago.

14 I will respond substantively why Mr. Sbaiti is wrong  
15 and there's no inconsistent positions when it's my time to  
16 speak. But for Mr. Sbaiti to say he was doing us a favor and  
17 he was reacting to recent new information is just wrong, Your  
18 Honor. And they should just not be continued to allowed to get  
19 away with flouting the rules.

20 THE COURT: All right. Well, let me just say I'm  
21 confused, maybe I should say baffled, about this amended  
22 motion. You know, the motion to dismiss that is before the  
23 Court for oral argument today isn't about the injunction, isn't  
24 about the plan injunction. It's about res judicata and other  
25 12(b)(6) arguments.

1           So I'm confused and I think, you know, it's been  
2 clear for many months in this adversary proceeding, in  
3 particular, the debtor's position on the plan injunction,  
4 particularly, you know, in the whole argument on the motion to  
5 leave to add Mr. Seery as a defendant.

6           So I'm confused, but we're going to go forward on the  
7 argument today, whatever argument you want to make. And you've  
8 been, I guess, forewarned. I will say that these last-minute  
9 amended motions are not going to be tolerated, are not going to  
10 be considered. And so, you know, I hope you won't do it again.  
11 Your firm has already been sanctioned once in this adversary  
12 proceeding. I'm sure we all remember.

13           So, you know, I'm just kind of baffled why you would  
14 take a chance filing an amended motion without leave or somehow  
15 getting it to the attention of the Court or running it by the  
16 other parties for their consent to you doing it. But we're  
17 going to go forward and just hear the arguments, okay. And so  
18 --

19           MR. SBAITI: Thank you.

20           THE COURT: -- I'll hear your argument.

21           I'm letting people know I don't know where this time  
22 estimate came on the calendar today, three hours. I don't know  
23 if someone specifically expressed that. But I'm letting you  
24 know at noon I have a swearing-in ceremony that I'm doing back  
25 in my chambers. So I will stop at noon Central time.

1 And so does anyone think that's going to be a  
2 problem?

3 MR. SBAITI: It should not be, Your Honor, from our  
4 perspective.

5 THE COURT: Mr. Pomerantz?

6 MR. POMERANTZ: I don't believe so. Mr. Morris is  
7 going to handle the motion to dismiss which is going to be the  
8 bulk. My presentation on the motion to stay is only going to  
9 be around ten minutes or so.

10 THE COURT: Okay. Thank you.

11 Mr. Sbaiti, your argument on the motion for stay.

12 MR. SBAITI: Thank you, Your Honor.

13 Your Honor, may I share my screen?

14 THE COURT: You may.

15 MR. SBAITI: I have a PowerPoint that can kind of --

16 THE COURT: Okay. You may.

17 MR. SBAITI: -- walk us through. Thank you.

18 Is Your Honor able to see my screen?

19 THE COURT: I can, yes.

20 MR. SBAITI: Thank you, Your Honor.

21 Your Honor, what I would point you to is, first, the  
22 injunction language. This is what Your Honor's permanent  
23 injunction says, and this is really what animates our motion to  
24 stay. Our motion to stay is derived specifically because my  
25 clients and I feel like our case has been enjoined by this

1 injunction, if not completely disposed of.

2 The language says that we're an enjoined:

3 "An enjoined party is permanently enjoined from  
4 commencing, conducting, or continuing in any manner  
5 any suit, action, or other proceeding of any kind  
6 including any proceeding in a judicial, arbitral,  
7 administrative, or other forum against or affecting  
8 the debtor or the property of the debtor."

9 And then (v) of that injunction says:

10 "or acting or proceeding in any manner in any place  
11 whatsoever that does not conform to or comply with  
12 the provisions of the plan."

13 One of the things that was suggested in Paragraph 22  
14 of their response was that the DAF and Holdco are not enjoined  
15 parties. But the final plan defines an enjoined party in  
16 Article 1(b) (56) as any entity who has or -- all entities who  
17 have held, hold, or may hold claims against the debtor; any  
18 entity that has appeared and/or filed any motion, objection, or  
19 other pleading in this Chapter 11 case regardless of the  
20 capacity in which such entity appeared and any other party in  
21 interest. And, five, the related persons of each of the  
22 foregoing.

23 Article 1(b) (22) defines a claim as any claim that's  
24 defined in Section 1015 of the Bankruptcy Code. And Section  
25 1015 of the Bankruptcy Code defines a claim as a right to

1 payment whether or not such right is reduced to judgment,  
2 liquidated, unliquidated, fixed, contingent, matured,  
3 unmatured, disputed, undisputed, legal, equitable, secured, or  
4 unsecured.

5           So given this definition, when we've read this  
6 injunction, we believed that we were enjoined parties, the DAF  
7 and Holdco were both enjoined parties. They had appeared in  
8 the -- they have claims. Obviously, those are the claims being  
9 asserted here.

10           And so going back to the injunction language, we  
11 believe this lawsuit has been disposed of by this permanent  
12 injunction. We believe there's really only one or two things  
13 that should probably happen with this lawsuit. Either it could  
14 be dismissed based upon the permanent injunction or what we  
15 proposed in our motion to stay is that the Court exercise its  
16 inherent authority to simply stay the case pending the appeal  
17 of this language, which is up on appeal in the Fifth Circuit  
18 right now.

19           If that language, and if the injunction gets affirmed  
20 by the Fifth Circuit, then certainly the dismissal can happen  
21 once that affirmance happens and there's no harm, no foul, and  
22 no one's wasted any time.

23           If they're not, if it's overturned, then, obviously,  
24 the injunction would be vacated, presumably by the Fifth  
25 Circuit. And at some point, if the Court decides not to enter

1 a similar injunction that would likewise dispose of this case,  
2 then the case could proceed on the merits.

3 The issue we've identified both in our original  
4 motion and as we fleshed out in our -- as a matter of law in  
5 our amended motion to simply put a finer point on it is that  
6 the merits are now -- have been disposed of. This injunction  
7 ends this case, at least as far as we read it. It ends this  
8 case irrespective of the underlying merits of the lawsuit,  
9 which means that the lawsuit merits themselves have become moot  
10 and any opinion or any attempt to resolve it is obviously an  
11 advisory opinion by the Court.

12 So we really only see two ways that this could go  
13 right now without either gutting the injunction or  
14 circumventing it completely, which is to say that either the  
15 case should be dismissed based upon the permanent injunction or  
16 the case should be stayed based upon the permanent injunction.

17 Mr. Pomerantz or the debtors' brief suggests that,  
18 well, the injunction doesn't prevent hearing pending motions.  
19 But I would respectfully disagree with that. If you look at  
20 the language, "commencing, conducting, or continuing in any  
21 manner in any suit, action, or other proceeding against or  
22 affecting the debtor."

23 As 12(b)(6) hearing, I would imagine, was intended to  
24 fall under the umbrella of a proceeding. And us arguing a  
25 12(b)(6) motion would us be conducting and maybe even



1 continuing the suit because we're trying to protect the merits  
2 of the suit, which as I said are at this juncture already moot.

3 And so it comes down to I think a very simple  
4 question, which is what do we do at this juncture. Do we just  
5 simply dismiss the lawsuit in light of this permanent  
6 injunction or stay the lawsuit in light of this permanent  
7 injunction?

8 The debtor makes a lot of hay out of the fact that,  
9 well, there are special rules that apply when you're trying to  
10 stay a case pending appeal. But if you look at all of their  
11 case law, it has to do with different circumstances where an  
12 appeal -- where there's a matter on appeal that could  
13 substantially affect the resolution of the case, which here we  
14 think it actually could. But in those cases, those appeals  
15 would affect the resolution of the case on the merits; whereas,  
16 here, the question goes to whether or not a permanent  
17 injunction that really has stopped us all in our tracks.

18 As soon as we understood this injunction and its  
19 scope, we're the ones who reached out to the debtor's counsel  
20 and asked them on a meet-and-confer whether or not they would  
21 just agree to stay the matter. And we were a little bit  
22 surprised by their reaction when they first didn't think that  
23 this applied to our case, and we didn't understand how. And  
24 then they changed their mind, said it did apply to our case but  
25 they didn't think that we should stay the case. And they

1 didn't suggest let's just dismiss it based upon the permanent  
2 injunction.

3           So it kind of comes down to the same small -- same  
4 simple issue, Your Honor. There's this permanent injunction,  
5 and I don't think there's any way for us to get around it at  
6 this juncture.

7           THE COURT: Mr. Pomerantz:

8           MR. POMERANTZ: Yes, Your Honor.

9           I'm going to respond to several of the arguments Mr.  
10 Sbaiti made in his motion, which apparently he's abandoned  
11 because he only is focused on the injunction. And I'm also  
12 going to tell Your Honor, what our arguments are because  
13 despite Mr. Sbaiti's efforts, he's completely misquoted them.

14           So in the motion and the amended motion, the  
15 Plaintiffs make several arguments why this Court should stay  
16 the matter. First, they argue they're entitled to a stay  
17 because the exculpation provision in the plan prohibits them  
18 from proceeding against the Defendants in the action. And  
19 there are several problems with that argument.

20           First, Mr. Sbaiti and the Plaintiffs don't even  
21 attempt to meet the Fifth Circuit's standards for a stay  
22 pending appeal because, of course, they can't. Mr. Sbaiti's  
23 trying to sidestep the grounds for a stay pending appeal by  
24 arguing it doesn't apply just is incorrect.

25           They would have to show that there is a likelihood of

1 success on the merits, they would suffer irreparable harm, the  
2 debtor wouldn't suffer irreparable harm, and there is -- public  
3 interest supports a stay. They can't do any of them.

4 In fact, as Your Honor is well aware, Your Honor  
5 denied the actual appellants in that suit, in that order, the  
6 confirmation order, a stay pending appeal and that was denied  
7 by the district court and also denied by the Fifth Circuit  
8 Court of Appeals.

9 The Plaintiffs didn't object to the plan, they are  
10 not parties to the appeal, and they never sought a stay pending  
11 appeal. So they really can't explain why they as really  
12 strangers to the appeal are entitled to a stay of the  
13 effectiveness of the plan when the actual appellants to that  
14 order were denied a stay pending appeal up through the  
15 appellate ladder.

16 Second, notwithstanding Mr. Sbaiti's arguments in the  
17 motion, the exculpation provision is neither as broad nor does  
18 it affect all the parties that are subject to this litigation.  
19 There are three Defendants in the complaint. The only  
20 Defendant that is covered by the exculpation provision is the  
21 debtor. The exculpation provision does not apply HCF Advisors,  
22 and it does not apply to Highland CLO Funding.

23 Also, while the exculpation provision does apply to  
24 the debtor, it only exculpates the debtor from claims of  
25 negligence. The complaint raises a variety of causes of action

1 that have nothing to do with negligence and would not be  
2 covered by the exculpation provision.

3 But, Your Honor, the biggest problem with their  
4 argument that the exculpation provision supports a stay is that  
5 the exculpation -- the appeal of the exculpation provision has  
6 nothing to do with this case. Why? Because the Fifth Circuit  
7 appeal concerns whether the exculpation provision is  
8 appropriate for parties other than the debtor. The debtor is  
9 the only Defendant in this case that obtains the benefit of the  
10 exculpation.

11 And there is no dispute, there was no dispute at  
12 confirmation, there's no dispute in the case law, there's no  
13 dispute in Pacific Lumber, there's no dispute in the appeal  
14 that a plan can exculpate the debtor. So the Fifth Circuit  
15 appeal doesn't implicate the exculpation provision and cannot  
16 support a basis for a stay.

17 The next argument Mr. Sbaiti makes is the injunction  
18 provision, and the injunction provision is on appeal to the  
19 Fifth Circuit. But the aspect of the appeal of the injunction  
20 is not the provision that Mr. Sbaiti points to.

21 And, again, as with the exculpation provision, the  
22 same arguments about failure to obtain a stay, failure to be  
23 party to the appeals, and failure to object to the plan apply,  
24 as well. But as is the case with the exculpation provision,  
25 the resolution of the appeal of the injunction provision will

1 not affect this case in any way.

2           They point to the portion of the injunction that  
3 prohibits enjoined parties from directly or indirectly  
4 continuing, commencing, or conducting in any manner any suit or  
5 action proceeding against the debtor. They argue that they  
6 cannot proceed without violating the injunction because the  
7 injunction was intended to put all litigation against the  
8 debtor to an end.

9           But, of course, Your Honor, that is not true. That  
10 is not what the injunction is. The issue on appeal before the  
11 Fifth Circuit as it relates to the injunction is whether the  
12 injunction impermissibly enjoins parties from enforcing their  
13 rights with respect to post-effective date commercial  
14 relationships with the reorganized debtor. And, of course, we  
15 argue that it's appropriate, but it has nothing to do with the  
16 provision Mr. Sbaiti identified.

17           The appeal does not impact in any way whether a plan  
18 can enjoin prosecution of claims that arose prior to the  
19 effective date. And, of course, such a plan provision is  
20 completely appropriate and is customary. The plan provided the  
21 debtor as the plan provides all debtors with a fresh start and  
22 enjoins litigation against the debtor.

23           But importantly, Your Honor, that does not mean as  
24 Plaintiffs argue that any liability for pre-effective date  
25 conduct just goes away and that creditors are left without a

1 remedy to pursue claims against the debtor for pre-effective  
2 date conduct.

3           Rather, if they have a pre-petition claim in lieu of  
4 their litigation that's pending, they file a pre-petition claim  
5 against the estate and that matter is resolved in the claims  
6 objection procedure. Or, as in the case here, when they make  
7 an allegation that there is a post-petition claim, what do they  
8 do? They file a request for payment of an administrative  
9 claim, and this Court addresses the validity of the  
10 administration claim. The lawsuit pending in another  
11 jurisdiction stops, but the claim has to be resolved in the  
12 bankruptcy court.

13           The only conduct that the injunction really prohibits  
14 is them from proceeding with actions in other courts. It does  
15 not deny them a remedy. Accordingly, their argument that they  
16 cannot proceed with claims against the debtor because of the  
17 injunction provision just lacks any merit and can't form the  
18 basis for a stay.

19           Plaintiffs' next argument in their briefing is that  
20 if the Court refuses to stay the complaint, they will file a  
21 motion to withdraw the reference of this matter to the district  
22 court. Your Honor, this is the biggest head-scratcher of them  
23 all given how this complaint ended up before Your Honor. This  
24 exact issue and Plaintiffs' arguments as to why the reference  
25 should be withdrawn have already been fully briefed and decided

1 by the district court.

2 As Your Honor may recall, the Plaintiff filed this  
3 action in the district court, conveniently failing to include  
4 the bankruptcy case as a related case or mentioning that the  
5 bankruptcy courts have related jurisdiction in the filings.  
6 Your Honor may have had occasion to review the underlying  
7 complaint when the debtor brought a motion for contempt against  
8 counsel for Plaintiffs for pursuing a claim against Mr. Seery  
9 in violation of Your Honor's January 9th, 2020 and July 16th,  
10 2020 orders.

11 Your Honor issued an order finding counsel and  
12 various parties in contempt which order is, of course, subject  
13 to appeal. At the time we were litigating the contempt motion,  
14 we filed two motions in district court. The first was a motion  
15 to enforce the reference and have the district court send that  
16 complaint to Your Honor. And that motion to enforce the  
17 reference is now on Your Honor's docket at Number 22 and 23.

18 The second was the motion to dismiss which is before  
19 Your Honor today. Plaintiffs oppose the motion to enforce the  
20 reference arguing that mandatory withdrawal was required  
21 because the matter involved consideration of non-bankruptcy  
22 federal law, specifically federal securities laws and the  
23 Investment Advisors' Act.

24 Plaintiffs further argue to the district court why  
25 would you refer the case to the bankruptcy court if it's only

1 going to end up back in the district court upon mandatory  
2 withdrawal of the reference. They argue to the district court  
3 that would be a complete waste of time.

4 We filed our reply at Docket Number 42 explaining to  
5 the district court why mandatory withdrawal of the reference  
6 did not apply and why this case should be referred to Your  
7 Honor. And what did the district court subsequently do? It  
8 entered an order referring this action to Your Honor which is  
9 why we are here today.

10 Plaintiffs now flout the district court's order of  
11 reference by telling the Court that if the Court does not stay  
12 the matter, they will file a motion to withdraw the reference  
13 before Your Honor, and they attach virtually identical pleading  
14 that they filed in opposition to our motion to enforce the  
15 reference.

16 Plaintiffs did not disclose in their amended motion  
17 that there was a fully-briefed motion to enforce the reference  
18 before the district court. Plaintiffs' argument is  
19 disingenuous and designed to mislead the Court.

20 The district court has only agreed that mandatory  
21 withdrawal of the reference does not apply and this case  
22 belongs in Your Honor. And while we cannot stop the Plaintiffs  
23 from filing any motion before this Court, we want to put them  
24 on notice that if they do file a motion for withdrawal of the  
25 reference in light of the facts as I just stated them, we will



1 seek sanctions.

2 In any event, Your Honor, the fact that they may file  
3 a motion for withdrawal of the reference at some point in the  
4 future is not grounds to stay the matter.

5 Lastly, Your Honor, Plaintiffs argued in the opening  
6 that Highland's position today in opposing the motion to stay  
7 is inconsistent with positions Highland has taken in two other  
8 lawsuits commenced by the Sbaiti firm. Like all of their other  
9 arguments, they misrepresent the facts and are frivolous.

10 The Sbaiti firm filed a complaint on behalf of the  
11 DAF in the district court arguing that Highland mismanaged  
12 (audio drop). That complaint followed in the heels of an  
13 almost identical complaint filed by Dugaboy asserting the same  
14 claims.

15 And Your Honor may recall questioning Mr. Sbaiti at a  
16 hearing in June how Dugaboy could pursue such a claim in the  
17 district court if Dugaboy had a pending proof of administrative  
18 claim on file in the bankruptcy case. Well, soon after that  
19 hearing, Your Honor, the Dugaboy complaint was dismissed, and a  
20 few days later the DAF complaint was filed. That complaint has  
21 never been served on Highland.

22 The second lawsuit is also a lawsuit filed by the  
23 Sbaiti firm on behalf of an entity called PCMG in the district  
24 court. And PCMG previously held less than five one-hundredths  
25 of a percent interest in a certain fund managed by highland.

1 The lawsuit alleges that Highland acted improperly to sell  
2 certain assets of the fund, thereby damaging PCMG. That  
3 complaint has also never been served on Highland.

4 The Plaintiffs sought a stay of those matters before  
5 Highland could file a response, and the court -- the district  
6 court's entered stays in those matters. And Highland has filed  
7 motions for reconsideration and the motions to dismiss because  
8 they violate the injunction.

9 But, importantly, Your Honor, if you read the  
10 motions, Highland does not argue that Plaintiffs do not have a  
11 remedy for the alleged wrongs they say they suffer. Rather,  
12 Highland's argument is that any claims alleged in those  
13 lawsuits, just like any claims alleged in the lawsuit before  
14 Your Honor today, must proceed in bankruptcy court as part of  
15 the claims objection process. That's where they will have  
16 their day in court. The lawsuits don't go away. The  
17 injunction prevents them from continuing on in district court.

18 Accordingly, Highland is being totally consistent in  
19 all matters, and the litigations may not proceed there but must  
20 proceed before Your Honor. And, of course, none of these three  
21 matters are implicated by the Fifth Circuit appeal.

22 Your Honor, the amended motion was procedurally  
23 improper and is substantively without merit. And for all these  
24 reasons, we request that the Court deny the stay motion and  
25 proceed with the hearing on the motion to dismiss.

1 Thank you, Your Honor.

2 THE COURT: All right.

3 Mr. Sbaiti, you get the last word.

4 MR. SBAITI: Thank you, Your Honor.

5 Your Honor, the administrative claim process that was  
6 described as being the way that these claims were supposed to  
7 proceed, by the language of the order that we read, does not  
8 allow for these claims. Those claims are limited to a specific  
9 category of claims that don't include the claims that are  
10 alleged in this lawsuit.

11 And in any event, this lawsuit wasn't filed as an  
12 administrative claim. So if that's the case and it needs to be  
13 refiled or reasserted as an administrative claim, then I think  
14 that's a subject for another day. All I know is that we have  
15 this injunction right now that either should stay this case  
16 pending the appeal, which I'll address the issue on appeal in a  
17 moment, or it should be dismissed, perhaps without prejudice so  
18 that it can be refiled properly as an administrative claim if  
19 that's what's supposed to happen, because I guess this converts  
20 the matter.

21 The appeal, the subject of the appeal as to the  
22 injunction, Your Honor, the appeal actually encompasses many of  
23 the issues that we're talking about in this case. Now Mr.  
24 Pomerantz tries to narrow the scope of what's up on appeal, and  
25 that may indeed be the argument that they're going to present

1 to the Fifth Circuit or that they've presented to the Fifth  
2 Circuit.

3 But the actual issue up on appeal is the  
4 enforceability and validity of the order for a variety of  
5 reasons which includes the provision that we're talking about  
6 and the enforceability of the provision that we're talking  
7 about because it gets rid of particular claims. And I guess  
8 the argument back is, no, it doesn't because there's now an  
9 alternative means of going there.

10 Mr. Pomerantz says that we shouldn't have proffered a  
11 motion to enforce the reference. That proffer, however, was  
12 because Judge Boyle's reference to this Court didn't deal with  
13 our motion to -- our cross-motion to withdraw the reference.  
14 All it dealt with was their motion to enforce the reference as  
15 a -- to enforce the standing order in the district court. And  
16 that's all she ordered was she cited the standing order and the  
17 statutes, I think it's 157(a), and that's really all it did.

18 So it left open the question of whether she wanted  
19 Your Honor to deal with the withdrawal of the reference  
20 specifically as to the 12(b)(6) issue in the first instance.  
21 It didn't resolve the question. It doesn't purport to resolve  
22 that question. And it's not unheard of for the district court  
23 then to send the matter to the bankruptcy court and then to  
24 piecemeal which proceedings the withdrawal of the reference is  
25 applicable to and then all the other proceedings would stay

1 with Your Honor or with the bankruptcy court.

2 So we weren't flouting the district court's order,  
3 and we certainly weren't flouting any of the previous orders.  
4 And the threat of a sanction for simply exercising our rights  
5 in due course is not well taken.

6 Now Mr. Pomerantz says, well, the DAF and CLO Holdco  
7 are not parties to the appeal. I don't think that's relevant  
8 because if the provision is struck by the Fifth Circuit, it's  
9 not only struck for the appellants, it's struck as to all.  
10 It's either valid or it's invalid. And even if it's declared  
11 to be invalid only as to the appellants, it's not suddenly  
12 valid as to everyone else who didn't appeal. That's not  
13 generally how these appeals have worked.

14 If the Court doesn't stay this matter, Your Honor,  
15 and doesn't dismiss it, we still maintain, Your Honor, that as  
16 it stands today, the question on the merits have been mooted  
17 and we cannot proceed. I think what Mr. Pomerantz is hoping  
18 for or the debtor is hoping for is a provision where our hands  
19 are potentially tied to argue the motion.

20 And if the Court tells us they're not, then we'll  
21 certainly argue the 12(b)(6). But what I don't want to do is  
22 argue a 12(b)(6) motion that on its face appears to violate the  
23 permanent injunction and then be held in contempt for violating  
24 that injunction.

25 And so that's why we've asked for the Court to either

1 stay the matter under its inherent jurisdiction or to -- if  
2 you're going to -- if it's not going to be stayed, then we  
3 believe it has to be dismissed according to the permanent  
4 injunction as it stands right now.

5 THE COURT: All right.

6 The motion to stay is denied. The amended motion to  
7 stay is likewise denied. This is an odd argument. I guess one  
8 might say the traditional four-factor test for a stay of a  
9 proceeding has really not been the subject of the argument here  
10 for a stay.

11 So suffice it to say the four-prong test for a stay,  
12 you know, hasn't been met here. There hasn't been a showing of  
13 substantial likelihood of success on the merits or irreparable  
14 injury if the stay's not granted or a stay will not  
15 substantially harm others or the stay would serve a public  
16 interest.

17 But going on to the arguments that were focused on by  
18 movant, I just don't think that you have shown that, you know,  
19 either the exculpation clause or the injunction provisions of  
20 the plan somehow tie your hands in arguing the 12(b)(6) motion,  
21 defending against the 12(b)(6) motion today or I just think  
22 that your arguments reflect, frankly, a misunderstanding of how  
23 the injunction language and exculpation language applies here.

24 So the motion for stay is denied, and I will ask Mr.  
25 Pomerantz to submit an order reflecting the Court's ruling.

1           So it looks like we have another procedural matter,  
2 Mr. Sbaiti. You filed a motion to strike reply appendix of the  
3 Plaintiffs quite a while back. So did you want to present  
4 that?

5           MR. SBAITI: Yes, Your Honor. I think it's a very  
6 simple procedural issue.

7           Generally, a party that files a 12(b)(6) is limited  
8 to the four corners of the complaint. And if there's a  
9 contract incorporated or a document incorporated as an  
10 intrinsic part of the complaint, you know, that's usually  
11 considered under the 12(b)(6) motion.

12           What the Defendants did, what the debtor here did is  
13 they filed a bunch of evidence in their 12(b)(6), essentially  
14 attempting to argue it as a summary judgment. We raised that  
15 in our response. So as part of our response, we objected to  
16 all the evidence. But then on the reply, they filed a bunch  
17 more evidence both without leave and improperly, basically  
18 sandbagged us.

19           And so we raised two points for striking that  
20 evidence. One was akin to the first argument, which is it's  
21 not an evidentiary hearing. It's not an evidentiary process in  
22 the first instance. A 12(b)(6) motion has to assume that the  
23 facts pled are true, and then the question is whether they  
24 state a claim.

25           And, secondly, adding them to the reply is especially

1 egregious because the reply is the last word. And we didn't  
2 have an opportunity to respond, and we also don't think it's  
3 relevant nor should we have to respond to a whole bunch of  
4 extra evidence that was attached.

5 That's essentially the basis of our motion, Your  
6 Honor.

7 MR. POMERANTZ: Your Honor, the simple answer to the  
8 issue is we filed the reply of the appendix in connection with  
9 the motion to enforce the reference. We didn't file it in  
10 connection with the motion to dismiss. The motion to enforce  
11 the reference is moot. So what Mr. Sbaiti, his whole argument  
12 doesn't make any sense.

13 As a substantive matter, just there wasn't any  
14 evidence. It was pointing to court pleadings, orders, and  
15 stuff. So it's irrelevant. I don't know why it's still on the  
16 docket. It shouldn't be on the docket since it related to the  
17 motion to enforce the reference.

18 THE COURT: All right. Mr. Sbaiti, did you just  
19 simply --

20 MR. SBAITI: Your Honor, much of that evidence was --

21 THE COURT: -- misunderstand or what?

22 MR. SBAITI: I think we might have because it was  
23 filed as a separate item, and it may have been miscalendared or  
24 misapplied on our system. But the way it was presented to us  
25 when we got it was it appeared to be evidence in support of,



1 well, I guess both, but certainly evidence that was averted to  
2 in the reply.

3 But if they're saying that the Court's not going to  
4 consider it, then that moots the motion and I think we can move  
5 on.

6 MR. POMERANTZ: Yes, Your Honor. I had nothing to do  
7 with his motion. I guess there was another mistake on their  
8 end. I guess that stuff happens occasionally.

9 THE COURT: Okay. All right. So I'll deny it as  
10 based on a mistake that's been acknowledged here. And so with  
11 that, let's have an order cleaning that up, as well, Mr.  
12 Pomerantz, please.

13 With that, we'll move on to the Defendants' motion to  
14 dismiss complaint. I think, Mr. Pomerantz, you said Mr. Morris  
15 will be making this argument?

16 MR. POMERANTZ: That is correct, Your Honor.

17 THE COURT: All right.

18 Mr. Morris, I'll hear your argument.

19 MR. MORRIS: Good morning, Your Honor. John Morris  
20 for Pachulski Stang Ziehl & Jones for the reorganized debtor.  
21 Can you hear me okay?

22 THE COURT: I can. Thank you.

23 MR. MORRIS: Okay.

24 Your Honor, this is a bit like Groundhog's Day. I  
25 believe that we're going to spend the next half hour or an hour

1 discussing the very issues that were before the Court earlier  
2 this year on the HarbourVest 9019 motion.

3           As the Court will recall from the June 8 hearing,  
4 there is a complaint that's been filed ostensibly by the DAF  
5 and CLO Holdco. As Your Honor will recall, the testimony  
6 established that Mark Patrick had just been installed as the  
7 trustee, had no knowledge of the prior events, and Mr. Dondero  
8 and Mr. Sbaiti spent quite some time together formulating this  
9 particular complaint that is nothing less than a collateral  
10 attack on the Court's prior order.

11           I'd like to, if I can, just walk through a PowerPoint  
12 presentation to try to make the debtor's position quite clear,  
13 if I may.

14           THE COURT: You may.

15           MR. MORRIS: And I would ask my assistant, Ms. Canty  
16 (phonetic), to put up the first slide.

17           Your Honor, you'll recall that last December, the  
18 debtor filed its motion under Rule 9019 for court approval of a  
19 settlement. The debtor was completely and utterly transparent  
20 in what the terms of the settlement were.

21           Very briefly, as set forth in Appendix 2 or Exhibit 2  
22 which was the motion itself, in Paragraph 32, Your Honor, the  
23 debtor set forth the terms of the transaction for which it was  
24 seeking approval. Those terms included in the very first  
25 bullet point a statement that HarbourVest shall transfer its

1 entire interest in CLOF to an entity to be designated by the  
2 debtor.

3           And that's an important point that we'll talk about  
4 in a number of different contexts, Your Honor. The debtor made  
5 it very clear at the very first moment of this matter that it  
6 was not going to acquire the asset but the asset was going to  
7 be transferred to an entity to be designated by the debtor.  
8 The debtor's motion filed last December clearly stated the  
9 value of the interest that it would be acquiring in return.  
10 That was also set forth in Paragraph 32 in a footnote.

11           It didn't say that it was the fair market value. It  
12 said the method of valuation was the net asset value and gave a  
13 valuation date of December 1st so that all parties in interest  
14 who received the motion understood the economics of the deal.  
15 And the deal that the debtor was asking the Court to approve  
16 was one whereby HarbourVest would receive certain claims and in  
17 exchange for those claims, they were going to transfer their  
18 interest in CLO -- HCLOF.

19           The debtor also filed on the docket for all to see a  
20 copy of the settlement agreement. The settlement agreement  
21 sets forth the terms of the deal, including again the statement  
22 that HarbourVest "will transfer all of its rights, title, and  
23 interest in HCLOF." It actually says to an affiliate or an  
24 entity to be designated by the debtor. And the transfer  
25 agreement itself was also put on the docket.

1           So that's where things stood just before Christmas.  
2 I know that there's some due process and other type arguments  
3 that are in the Plaintiffs' opposition to the motion. But, of  
4 course, the undisputed facts are that the debtor timely filed  
5 the motion. The time period was consistent with all applicable  
6 rules. Nobody ever asked the debtor for an extension of time.  
7 Nobody ever filed a motion for an extension of time. And so  
8 those due process arguments I think carry no weight at all.

9           So the debtor filed the motion. And if we can go to  
10 the next slide, we see what the responses were, and there were  
11 several. All of the responses, the only responses were  
12 objections to the motion filed by Mr. Dondero and his certain  
13 of his affiliated entities.

14           Mr. Dondero's objection can be summarized as follows.  
15 He made the following observations and asserted the following  
16 objections to the proposed settlement. The first thing he said  
17 is that the settlement far exceeds the bounds of  
18 reasonableness. Now, of course, one cannot make a  
19 determination of reasonableness without having an understanding  
20 of value. The debtor was giving something and it was getting  
21 something.

22           And so Mr. Dondero understood that the issue of value  
23 was front and center. If there was any mistake about it, he  
24 also noted that he understood that as part of the settlement  
25 and, again, I've written this incorrectly, HarbourVest will

1 transfer its entire interest in HCLOF to the debtor. That is  
2 not what Mr. Dondero understood. In fact, Mr. Dondero  
3 understood that it would transfer its entire interest in HCLOF  
4 "to an entity to be designated by the debtor," again, making it  
5 clear that he knew exactly what the debtor was doing here. And  
6 that can be found at Appendix 4 in Footnote 3 on Page 1 if you  
7 want the exact quote from Mr. Dondero's pleading.

8 In the same footnote, he also specifically  
9 acknowledges that he understood the valuation. He understood  
10 the method valuation. He understood the valuation date of  
11 December 1st. And he urged the Court in his pleading to  
12 scrutinize the settlement to make clear that the available  
13 value of the investment should be realized by the debtor's  
14 estate.

15 And this is such a critical point, Your Honor. His  
16 concern was that by placing the value in an entity other than  
17 the debtor itself, that the Court wouldn't have jurisdiction  
18 over that asset. That was his concern. So not only did he  
19 understand that the asset was going to be transferred to an  
20 affiliate, he wanted to make sure that this Court had  
21 jurisdiction over the asset.

22 And, of course, Mr. Seery in his testimony and  
23 otherwise, we provided the Court with all the comfort it needed  
24 to know that even though it was being assigned to a special-  
25 purpose vehicle wholly-owned by the debtor, it would

1 nevertheless be subject to the Court's jurisdiction.

2 Mr. Dondero's trusts also filed an objection if we  
3 can go to the next slide.

4 Dugaboy and Get Good represented by Douglas Draper  
5 made the following observations and asserted the following  
6 objections to the HarbourVest Settlement. They, too, made  
7 clear that they understood that the asset was going to be  
8 transferred to an entity designated by the debtor. They, too,  
9 acknowledge that they understood that the debtor was valuing  
10 the asset at approximately \$22 million as of December 1st. And  
11 their objection was that the Court couldn't evaluate the  
12 settlement without knowing how the asset was valued, without  
13 knowing whether the debtor could acquire the asset, very  
14 critical point.

15 These are the points that are made in the complaint.  
16 These are the exact same points that are made in the complaint.  
17 And also the Court couldn't evaluate the settlement unless they  
18 understood that the value would be inure to the benefit of the  
19 debtor's estate, again, mimicking Mr. Dondero's concern that by  
20 placing the asset in an affiliate of the debtor, that it might  
21 not be subject to the Court's jurisdiction.

22 Finally, and most importantly, if we can go to the  
23 next slide. The Plaintiff, CLO Holdco, filed an objection to  
24 the 9019 motion. And this is just so critical. And this is  
25 the Groundhog Day aspect that I specifically speak of. CLO

1 Holdco's objection was based solely on its assertion that it  
2 had a superior right to the opportunity to acquire the asset  
3 that was being transferred by HarbourVest. It only made one  
4 argument in support of its contention that it had a superior  
5 right, but that argument was specifically premised on the  
6 membership agreement, Section 6.1 and 6.2 of the membership  
7 agreement.

8 CLO Holdco, the Plaintiff in the underlying action,  
9 argued to this Court that HarbourVest had no authority to  
10 transfer the asset without complying with the right of first  
11 refusal that would give CLO Holdco the opportunity to take the  
12 asset for itself. That's what this Court was told. CLO Holdco  
13 didn't make this argument fleetingly. They provided an  
14 extraordinarily detailed analysis of Sections 6.1 and 6.2 of  
15 the membership agreement and concluded "that HarbourVest must  
16 effectuate the right of first refusal before it can transfer  
17 its interest in HCLOF. That was the objection. Objections  
18 have consequences, as Your Honor knows.

19 If we can go to the next slide.

20 By filing an objection, CLO Holdco and the trusts and  
21 Mr. Dondero became participants in the litigation.  
22 Notwithstanding the Plaintiffs' arguments to the contrary, when  
23 they file the objections, they participate in what's called a  
24 contested matter. And in a contested matter, they had every  
25 right to take all discovery on any issue that was related to

1 the 9019 motion, including the transfer, the disposition of the  
2 asset to an affiliate of the debtor, the valuation of the asset  
3 that's being received, the merits of the settlement itself, the  
4 causes of action, whether, you know, what communications that  
5 were, the negotiations, what did Mr. Seery and Mr. Pugatch  
6 discuss? Right?

7           They could have taken any discovery they wanted. And  
8 they did avail themselves of discovery, in fact. They did -- I  
9 don't know why they did what they did, but they chose to take  
10 one deposition, and that was Mr. Pugatch, okay.

11           His deposition transcript, I think is at Exhibit 7,  
12 or Appendix Number 7, and it was a long deposition. It really  
13 was. And they asked Mr. Pugatch at the deposition if he knew  
14 what the value of the asset that was being transferred was.  
15 And he said \$22.5 million. So it wasn't just Mr. Seery or the  
16 debtor who was subscribing to this valuation. The party on the  
17 other side of an arm's length negotiation was subscribing to  
18 the exact same valuation.

19           The Plaintiffs could have taken whatever discovery  
20 they wanted. This is a full and fair opportunity to  
21 participate in the litigation. We proceeded to trial. Before  
22 we got there, actually, the debtor filed its response to CLO  
23 Holdco's objection and proffered its own very detailed and  
24 apparently very persuasive analysis that CLO Holdco's objection  
25 was without merit, that CLO Holdco had no right of first



1 refusal under the facts and circumstances as they existed, and  
2 with Grant Scott, Mr. Dondero's childhood friend at the helm,  
3 we got to Court for the contested hearing on the debtor's 9019  
4 motion, and CLO Holdco withdrew their objection.

5           And I've put up on the screen just an excerpt of the  
6 transcript because, you know, when we talk about whether or *res*  
7 *judicata* should apply, because was there a hearing on the  
8 merits? Was there a decision on the merits? Just look at the  
9 words of CLO Holdco's lawyer. "CLO Holdco has had an  
10 opportunity to review the reply briefing and after doing so has  
11 gone back and scrubbed the HCLOF corporate documents based on  
12 our analysis of Guernsey law."

13           And some of the arguments of counsel in those  
14 pleadings and our review of the appropriate documents, counsel  
15 obtained the authority from Mr. Scott to withdraw the CLO  
16 Holdco objection based on the interpretation of the member  
17 agreement. We were grateful for that and the Court  
18 specifically said in response, "That eliminates one of the  
19 major arguments that we had anticipated this morning."

20           Apparently, the Plaintiffs believe that those events  
21 have no meaning and that this Court's reliance on CLO Holdco's  
22 substantive withdrawal of its objection has no meaning. I  
23 think they're wrong, and we'll get to that in a moment.

24           We proceeded with the hearing. Mr. Seery and  
25 Mr. Pugatch testified at length. If you look at Footnote 3,

1 you'll see Mr. Seery testified for almost 70 pages of  
2 testimony. Mr. Pugatch testified for almost 45 pages of  
3 testimony. His testimony was exhaustive. And, again, any of  
4 the objecting parties had the right to ask whatever questions  
5 they want.

6 But I do want to just note a few things that aren't  
7 up on the screen right now. If you go to Appendix 9, Your  
8 Honor, which is the transcript of the hearing, at Page 13, you  
9 will see that the very first thing I discussed in my opening  
10 statement was the economics and how with a valuation of \$22.5  
11 million this deal made sense for the debtor.

12 You will see from Pages 30 to 42 there is extensive  
13 testimony from Mr. Seery about the amount and the value of the  
14 asset. But the most important part of Mr. Seery's testimony is  
15 that he explains how it came to be that HarbourVest agreed to  
16 transfer its interest in HCLOF to an affiliate of the debtor.  
17 And that came about, not because Mr. Seery or the debtor was  
18 initially at all interested in doing this. The whole idea  
19 originated with HarbourVest.

20 They wanted to extract themselves from the Highland  
21 platform. They wanted to give this piece up. So there's no  
22 conspiracy going on here. The unrebutted testimony that all of  
23 the objecting parties had an opportunity to challenge was that  
24 the whole idea originated with Mr. Pugatch and with  
25 HarbourVest. I think that's an important point to take into

1 account.

2 And finally, again, from the hearing, if you look at  
3 at Appendix 9, you'd also find that Mr. Pugatch, again,  
4 testified, as he had in his deposition, as to the value of the  
5 interest being transferred. So we completed the testimony. We  
6 rested our case having had a full and fair opportunity to  
7 contest the motion. The objecting parties rested as well. And  
8 we got to the point where we had to prepare the notice, and we  
9 were discussing that at the hearing, if we can go to the next  
10 slide.

11 And it's very important, because again, this was all  
12 done transparently, and it was all done on the record. And  
13 after the close of evidence, I addressed the order that was  
14 going to be prepared. I specifically said that I wanted to  
15 make clear that we were going to include a provision, "that  
16 specifically authorizes the debtor to engage in, to receive  
17 HarbourVest the asset, you know, the HCLOF interest," right. I  
18 wanted everybody to know that was what was going to happen, and  
19 then I said, "The objection has been withdrawn." I think the  
20 evidence is what it is and we want to make sure that nobody  
21 thinks they're going to go to a different court somehow to  
22 challenge the transfer. But yet, that is exactly what the  
23 complaint seeks to do.

24 Having put everybody on notice as to where we were  
25 going, as to what the evidence showed, the debtor drafted and

1 the Court adopted an order, and the order says, among other  
2 things, that HarbourVest was authorized to transfer its  
3 interest to the debtor. Actually, it says, "to a wholly owned  
4 and controlled subsidiary of the debtor," pursuant to the  
5 transfer agreement, "without the need to obtain the consent of  
6 any party or to offer such interest first to any other investor  
7 in HCLOF." So the Court heard the 9019 motion pursuant to a  
8 Bankruptcy Rule and entered an order that was unambiguous and  
9 that the Plaintiffs did not appeal from.

10 We can go to the next slide.

11 At a very high level, Your Honor, it is just crystal  
12 clear that the complaint is just inextricably intertwined with  
13 the 9019 proceedings and the order itself. I think Mr. Sbaiti  
14 would agree with me that but for the order that approved the  
15 transfer of the asset and the testimony about the value of that  
16 asset, they have no claims.

17 Every single claim is predicated on what happened in  
18 the 9019 hearing. Every single claim is predicated on the  
19 Court's order approving the transfer of the asset and the  
20 testimony and evidence that was adduced in relation to that  
21 asset.

22 There were really only two issues that the Court -- I  
23 mean, if you want to think about it at its most simplistic  
24 level, the Court was being asked to assess, is it fair, is it  
25 reasonable, is it legally permissible for the debtor to give

1 something. In this case, allowed claims and releases, and to  
2 get something in return. In this case, HarbourVest's interest  
3 in HCLOF and releases in return. And that is really the  
4 gravamen of the complaint.

5           The complaint is based whether it's breach of  
6 fiduciary duty or RICO or breach of contract or tortious  
7 interference, whatever the claim is, none of them exist if the  
8 debtor doesn't get this. They just don't exist. And that is  
9 why the complaint and the proceeding are inextricably  
10 intertwined. And if you just take a look at just one paragraph  
11 of the pleading, it says at the core of this lawsuit is the  
12 fact that HCM, that's the then debtor, purchased the  
13 HarbourVest interests in HCLOF for \$22.5 million knowing that  
14 they were worth far more than that. There's not a cause of  
15 action that exists in the complaint that isn't dependent on  
16 Paragraph 36.

17           So if we can go to the next slide with that  
18 background, I'd like to argue why under 12(b), the complaint  
19 should be dismissed because the claim should be barred under  
20 the doctrine of *res judicata*. Luckily, Your Honor, there is at  
21 least one area of agreement between the parties here, and that  
22 is the purpose of the doctrine and the elements that have to be  
23 satisfied in order to meet the burden of proof necessary to  
24 have the claims barred. And in Footnote 1, you can -- I've  
25 tried to just be helpful to the Court to show that we may not

1 cite to the exact same cases, but the parties agree that the  
2 doctrine is intended to foreclose the re-litigation of claims  
3 that were or could have been raised in a prior action and that  
4 there's four elements that have to be satisfied for the  
5 doctrine to apply.

6           The parties have to be either identical or at least  
7 in privity, the judgment in the prior action had to have been  
8 rendered by a court of competent jurisdiction. Number three,  
9 the prior action had to have been concluded by a judgment on  
10 the merits. And the last one is that the same claim or cause  
11 of action was involved in both suits. So I just want to spend  
12 a few minutes now, Your Honor, going through those four  
13 elements to show the Court how easily the reorganized debtor  
14 meets this standard.

15           If we can go to the next slide, I can take care of  
16 the first two elements very quickly.

17           The first element, the debtor asserted that the  
18 Plaintiffs were parties or in privity with parties to the prior  
19 proceeding. That's at Paragraph 17 of the motion to dismiss.  
20 The debtor relies on the deposition testimony of Grant Scott,  
21 who was then the trustee of the DAF.

22           CLO Holdco is a wholly-owned subsidiary of the DAF,  
23 or wholly controlled, in any event, and Mr. Scott's testimony  
24 was that he was the only director and there were no employees  
25 of either entity. So we, in our motion, put forth evidence to

1 establish the first element, and I don't believe, maybe I've  
2 missed it. I don't believe that the Plaintiffs have contested  
3 that element. If they have, I think Mr. Scott's testimony will  
4 carry the day, in any event.

5           The second element as to whether or not a court of  
6 competent jurisdiction is the entity or the court that rendered  
7 the ruling. Of course, that's been met, too. The Plaintiffs,  
8 in their opposition to the motion to dismiss, suggested that  
9 the bankruptcy court would have lacked jurisdiction if their  
10 cross motion to withdraw the reference was granted. They said  
11 if the district court decides that mandatory withdrawal  
12 applies, then it cannot find that the bankruptcy courts already  
13 entered final judgment was rendered on Plaintiffs' causes of  
14 action and had jurisdiction to do so. I think that's just a  
15 clear misstatement of the law.

16           But in any event, Your Honor, at this point, I  
17 believe it's irrelevant because the district court, in fact,  
18 sent the case back to Your Honor and back to this Court. And  
19 so, at the end of the day, Plaintiffs' argument doesn't hold  
20 water because of the district court's ruling, which can be  
21 found -- the order of reference can be found at Docket  
22 Number 64. And so I think that easily takes care of the second  
23 prong.

24           The third prong is whether -- if we can go to the  
25 next slide -- the prior proceeding resulted in a judgment on

1 the merits. And this is really the critical point, Your Honor.  
2 As the Court knows, the whole doctrine of *res judicata* is  
3 designed to prevent, as the parties agree, the re-litigation of  
4 claims. Stated another way, it's to bring finale. It's to  
5 make sure that the Court doesn't hear the same claims and the  
6 same issues that either were brought or that could have been  
7 brought in a prior proceeding. And so, we believe that we  
8 easily meet the standards set forth in the third prong. The  
9 9019 order necessarily determined that the *quid pro quo* that I  
10 described earlier was fair, reasonable, and legally  
11 permissible.

12           Notwithstanding their assertions to the contrary, the  
13 Plaintiffs are most definitely seeking to unwind at least one  
14 half of the Court's order by belatedly claiming that they are  
15 entitled to the benefit of the bargain while leaving Highland  
16 burdened, frankly, with the claims that HarbourVest got as part  
17 of the deal. I will tell you, Your Honor, and this is  
18 argument, the debtor would never have asked for, and I don't  
19 believe that the Court would ever have granted, the 9019 motion  
20 if they thought that there was a risk in the future that  
21 Highland wouldn't get the benefit of the bargain and it was  
22 incumbent upon CLO Holdco and the DAF, and frankly, any party  
23 in interest, to stand up and be counted and tell the Court and  
24 the debtor, why the debtor was not entitled to do this deal and  
25 CLO Holdco did that. They actually did.



1           They stood up and they filed an objection and they  
2 said we have a superior right to this asset in the form of a  
3 right of first refusal. They wound up folding in the face of  
4 persuasive argument, and I respect the lawyer who did that. I  
5 just do. But that was the time to speak up, and that's why it  
6 is on the merits because that is exactly what *res judicata* is  
7 intended to do. It's intended to have everybody put your cards  
8 on the table. You don't put one card on the table and say, I'm  
9 going to challenge this under 6.2 of the members agreement, but  
10 I'm not going to tell you that I also think you owe me a  
11 fiduciary duty under the Advisors Act or as the control party  
12 or under any other theory that they had. They can't do that.  
13 That's exactly what the problem is here.

14           If we can go to the next slide. Is it a judgment on  
15 the merits? The debtor and the Court relied on CLO Holdco's  
16 representation that it was withdrawing its argument, its claim,  
17 its contention, its assertion that it had a superior right to  
18 obtain the HarbourVest interest in HCLOF. Again, they did so  
19 not whimsically, not because Mr. Kane was going to be out of  
20 town and he couldn't make the hearing. He did it after, and I  
21 don't think this matters frankly, but I think it's worth noting  
22 that he did it after an extremely careful analysis. I would  
23 tell you, Your Honor, that -- well, I would argue, Your Honor,  
24 that even if Mr. Kane at CLO Holdco had never filed an  
25 objection, if they'd never filed -- if they'd gotten notice

1 that this was happening and they sat silently, that would have  
2 been enough for *res judicata* because the issue before the Court  
3 was whether it was legally permissible for the debtor to  
4 acquire this asset.

5 And if they had an obligation, if they owed a duty to  
6 another party, it wouldn't have been legally permissible. And  
7 if somebody believed that it wasn't legally permissible because  
8 a duty was owed to them, they had an obligation to speak up.  
9 And so I think it's very important, particularly for the  
10 collateral estoppel argument that I'll make in a moment, that  
11 CLO Holdco did in fact file an objection. It was based on the  
12 breach of contract claim that's in their complaint. It's the  
13 exact same claim. And they withdrew it. I think it's very,  
14 very important. I think it highlights why *res judicata*  
15 applies. I think it is the linchpin of the collateral estoppel  
16 argument.

17 But at the end of the day, I think if they say  
18 nothing, they should be estopped or precluded under *res*  
19 *judicata* from now asserting -- it would be like -- I was  
20 thinking about this earlier, Your Honor. If you'll remember  
21 earlier this year, Mr. Dondero and his entities have kind of a  
22 habit of withdrawing objections at the last minute. We had a  
23 couple of sale hearings earlier this year. And the issue was  
24 valuation, you know, and the process, and could the debtor meet  
25 its burden of proving that the sale outside of the ordinary

1 course of business was in the debtor's best interest. And they  
2 sold that restaurant. And Mr. Dondero objected. And at the  
3 last second, they withdrew the objection. Did they sue  
4 tomorrow? Does Your Honor really think that they could bring a  
5 lawsuit tomorrow and say they just found a document or theory  
6 on which the debtor had an obligation to give them a right of  
7 first refusal, even though we've already closed on the  
8 transaction, even though they were given notice of the  
9 transaction, even though they filed an objection to the  
10 transaction, even though they withdrew the objection? Would  
11 the Court tolerate for one second a new pleading tomorrow from  
12 Mr. Dondero that the debtor actually had a fiduciary duty to  
13 give him a right of first refusal to buy that asset under  
14 whatever theory, just because he pleads it and the Court has to  
15 accept as true the allegations in the complaint? I think not.  
16 And I think it's worth thinking about that to highlight just  
17 how -- just how wrong this is.

18 Continuing on. You know, the Plaintiffs in  
19 opposition say it can't be a trial on the merits because we  
20 weren't parties. Of course they were parties. Again, they  
21 filed an objection. They were the parties to the contested  
22 matter, full stop. They rely on a case called Applewood and  
23 they say, this is the very first point they make in their  
24 brief. Applewood, if it wasn't *res judicata* in Applewood, how  
25 could it possibly be *res judicata* here? But the facts are just

1 so inapposite, right?

2 In Applewood, you had a garden variety plan and  
3 release where the debtor and the officers and directors got a  
4 discharge. No objection to it. And a secured lender later on  
5 sought to sue guarantors who happened to be officers and  
6 directors. And the court, not surprisingly, said that the  
7 confirmation order wouldn't prevent the secured lender from  
8 going after the officers and directors, not in their  
9 capacities, as such, but in their capacity as guarantors, which  
10 were never part of the confirmation order. That just doesn't  
11 apply here because here, we have the debtor making a motion  
12 before the Court in which it sought permission and authority to  
13 acquire a particular asset. Anybody who had a claim to that  
14 asset should have stepped forward and put their cards on the  
15 table.

16 And again, CLO Holdco put their cards on the table  
17 and they lost, and they folded. To use the poker analogy, they  
18 folded. And to hear them come into Court today and say we're  
19 going to sue you because I reshuffled the deck, it's not right  
20 and Applewood has no relevance.

21 Finally, Your Honor, you know, it's not on the  
22 merits, they say, because you know, Mr. Seery and the debtor  
23 hid the true value of the asset, and had we only known the true  
24 value of the asset, we would have made all of these other  
25 claims. The fact of the matter is, you either have a fiduciary

1 duty or you don't. And if you had a fiduciary duty, they  
2 should have spoken up and they did only under 6.2, but they  
3 did.

4 But here's the important part, Your Honor. Take the  
5 allegations as true. You have to take all of the allegations  
6 as true, not just some of them. And if you look at  
7 Paragraph 127 of the complaint, and I would ask Ms. Canty to go  
8 to Appendix 11 and let's just put Paragraph 127 up on the  
9 board.

10 Here's the irony of the whole thing, right. The  
11 whole complaint is based on the fact that somehow Mr. Seery was  
12 engaged in insider trading. They accused him of insider  
13 trading, and they say he didn't disclose the full value of the  
14 asset. Just read Paragraph 127. James Dondero, who was on the  
15 board of MGM, is the tippee. You've got an insider trading  
16 case -- I mean, I don't represent MGM. I'm not with the SEC.  
17 I don't know why Mr. Dondero thought he should be telling  
18 Mr. Seery in December, 2020. It's not clear if it was before  
19 or after the 9019 motion was filed. But Mr. Dondero is the  
20 very source of information -- you can't make this up. He's the  
21 very source of the information that he now complains Mr. Seery  
22 didn't disclose.

23 Of course, Mr. Dondero, the trust, CLO Holdco could  
24 have asked Mr. Seery at any time, how did you come up with your  
25 valuation? Mr. Dondero, knowing that he had supplied to

1 Mr. Seery, according to Paragraph 27, please take it as true  
2 for purposes of this motion only. He's the source of the  
3 inside information. And now he has the audacity to come to  
4 this Court, notwithstanding the Court's approval, all of the  
5 time and money and effort spent in the 9019 process, and say,  
6 Mr. Seery was wrong because he didn't tell CLO Holdco and the  
7 DAF about the information that Mr. Dondero gave to Mr. Seery.  
8 It's not right.

9           It was a judgment on the merits. And if Mr. Dondero  
10 or the DAF or CLO Holdco or the trust wanted to challenge the  
11 valuation, they had every opportunity to do so. And based on  
12 Paragraph 127, if the Court accepts it as true, shame on them.  
13 Shame on them for not pursuing this issue before. The guy gave  
14 Mr. Seery, according to this allegation, and I'm just going to  
15 leave it there, inside information. And he sits there in  
16 silence, right? It says, look at the last sentence: "The news  
17 of the MGM purchase should have caused Seery to revalue HCLOF's  
18 investment." Seriously?

19           The third element is (indiscernible). The fourth  
20 element, if we can go to the next slide.

21           Are they the same claims? Did the claims arise from  
22 the same set of operative facts? I've addressed this pretty  
23 clearly already, so I don't want to belabor the point. But  
24 obviously, both the 9019 motion and the complaint arise solely  
25 from the debtor's settlement with HarbourVest. The debtor's

1 acquisition of HarbourVest's interest in HCLOF and the debtor's  
2 valuation of that interest. Without those three facts, there  
3 is no complaint. It's just not credible to argue that the  
4 fourth element is not met.

5 The case law is clear. It's quoted in the  
6 Plaintiffs' opposition. It's not just the test of whether the  
7 claims are the same. It's whether the claim is the same as  
8 that which was brought or could have been brought.

9 In their opposition, the Plaintiffs contend that the  
10 claims "did not write them until after the settlement was  
11 consummated," and that the first time the plaintiffs heard  
12 about the valuation of HarbourVest's interests was at the  
13 January 14, 2021, hearing. I think I quoted that. If you  
14 look, I don't know if it's Page 10 or Paragraph 10; the way I  
15 wrote it, it's probably Page 10. I think that's a quote right  
16 out of there. But of course, as we saw the debtor disclosed  
17 the valuation in its very initial motion, CLO Holdco's counsel  
18 elicited valuation testimony directly from Mr. Pugatch, so that  
19 was before the hearing.

20 And of course, Mr. Dondero and the trusts both cited  
21 in their objections the valuation. The notion that this was  
22 not right, just -- it's contradicted by their own conduct,  
23 their objections, their questions in deposition, the  
24 information that was contained in the motion that they objected  
25 to.

1 I do want to go off-script for just a minute, if we  
2 could just take that down because I know that this is probably  
3 something that Mr. Sbaiti may argue. And that is, well, gee,  
4 but you have to take the allegation as true that Mr. Seery  
5 wasn't honest, that Mr. Seery lied to the court. I don't  
6 understand why there's not a fraud cause of action in there,  
7 but there's not. But that's their theory.

8 And gee, how does he get to skate away Scott free if  
9 he's allowed to do that with impunity, right? I will tell you,  
10 Your Honor, of course you've seen Mr. Seery many times. You've  
11 made your own assessments of his credibility. I'm not here to  
12 argue the merits, but I will just say that the Defendants, if  
13 ever forced to, will contest the allegation.

14 But here's the thing, and here's the important point  
15 about, you know, whether or not he could lie with impunity and  
16 say, I suspect that's where Mr. Sbaiti is going to want to go.

17 Mr. Seery said what he said. And he had a reason to  
18 speak, and he spoke, and he said what he said and he told  
19 everybody who would listen exactly what he was doing and how he  
20 was doing it. For whatever reason, the objectors put the  
21 valuation front and center. It's right in their objections.  
22 They noted the objections. But for whatever reason, they did  
23 nothing.

24 Whether they were negligent or whether they were  
25 lying in wait is kind of irrelevant. They had a full and fair



1 opportunity to contest this issue. And if they had done so,  
2 and the evidence proved what they're now alleging, they can't  
3 tell you what would have happened. So, you know, HarbourVest  
4 may have taken a different position. The Court may have done  
5 something.

6           We're never going to know now because Mr. Seery and  
7 the debtor are getting away with something, but because they  
8 put in evidence that went unchallenged by Mr. Dondero and the  
9 Plaintiffs. It simply went unchallenged. And they say, oh,  
10 gee, that's because we didn't know. Well first of all, you  
11 didn't ask. And second of all, again, the source of the inside  
12 information, the reason that Mr. Seery should have known the  
13 asset was worth more. The reason that he should have refrained  
14 from trading and not engaged in insider information was  
15 Paragraph 127. It was Mr. Dondero.

16           Here's another thing. If -- if again Mr. Seery had  
17 not been honest with the Court and that was ever brought out,  
18 Maybe HarbourVest -- maybe HarbourVest would have had a right  
19 to complain. There's a lot in the complaint about oh,  
20 HarbourVest was misled. The actual evidence that's in the  
21 record, and this is part of res judicata, Mr. Seery testified  
22 very clearly to the arm's length negotiation that took place.  
23 He told the Court under oath that the negotiations were  
24 contentious.

25           He told the Court under oath that in order to try to

1 resolve the case, he and Mr. Pugatch went off and had their own  
2 private conversation without lawyers. They could have taken  
3 discovery on any of that, right. What did you guys talk about?  
4 It's certainly not privileged. They had every opportunity.  
5 But what we do know is that Mr. Pugatch under oath, in  
6 deposition, and at trial, said the value is \$22.5 million.

7           So I don't think Mr. Pugatch or HarbourVest is ever,  
8 ever, every going to complain about the transaction they did.  
9 Because of what the evidence simply shows. But again, you've  
10 got the Plaintiffs in their complaint saying that somehow the  
11 debtor and Mr. Seery in negotiating this transaction has now  
12 exposed the debtor to liability. It just makes no sense.

13           So there was a time and there was a place to  
14 challenge Mr. Seery. Somebody, you know, maybe HarbourVest  
15 could have done something, maybe they could still do something.  
16 I don't know. If they really think that there's a problem,  
17 maybe we'll hear from HarbourVest someday. But the Plaintiffs  
18 have no right to complain. They just don't. They knew  
19 everything. They were the source of the inside information.  
20 They sat on their hands, and they shouldn't be allowed to do  
21 what they're doing now.

22           If we can go to the next slide. I want to move to  
23 the next theory and try to finish this up. The next theory is  
24 that the Plaintiffs' claims are barred by judicial estoppel.  
25 The judicial estoppel argument is really, really very

1 straight-forward. And it's important because if the Court  
2 thinks about this the way I do, it's that the whole issue of  
3 valuation is completely irrelevant to the Plaintiffs unless  
4 they can show that they were owed some kind of duty, that they  
5 had some superior right to acquire the asset. But that's  
6 exactly the issue that CLO Holdco relied upon and withdrew and  
7 should now be estopped from pursuing. Right.

8           The legal standard, again the parties agree on, that  
9 in order to be estopped, the party must take an inconsistent  
10 position. And the party must have convinced the Court to  
11 accept that position. Again, both prongs are easily met here  
12 in just a few sentences from the January 14 hearing. You have  
13 Mr. Kane saying that he understands and acknowledges and admits  
14 that they have no superior right to the investment. And the  
15 Court relying on that very representation in declining to  
16 conduct a hearing and render a ruling on the merits of the  
17 claim that was withdrawn. The objection that was withdrawn.

18           And for the avoidance of doubt, after Mr. Draper  
19 spoke on behalf of the Trust, the Court, at Page 22 engaged in  
20 the following colloquy. The Court asked Mr. Draper:

21           "THE COURT: Were you saying that the Court still  
22 needs to drill down on the issue of whether the  
23 debtor can acquire HarbourVest's interest in HCLOF.

24           "MR. DRAPER: No.

25           "THE COURT: Okay. I was confused whether you were

1 saying I needed to take an independent look of that.  
2 Now that the objection has been withdrawn of CLO  
3 Holdco, you're not pressing the issue.

4 "MR. DRAPER: No. I am not."

5 Okay. You can call it res judicata, you can call it  
6 judicial estoppel, collateral estoppel, the two prongs are  
7 easily met. They're taking an inconsistent position today and  
8 through all kinds of different theories, including the one that  
9 they withdrew, the Plaintiffs assert that they had a superior  
10 right to acquire the interest from HarbourVest.

11 And they should have asserted those rights at the  
12 hearing. That was the time. And they should be estopped now  
13 from taking a completely inconsistent position from the one  
14 that was before the Court. And I just do want to point out,  
15 the statement from a case called Hall vs. G.E. Plastic. And  
16 it's interesting, Your Honor, because there's only a few cases  
17 that I focused on, because this is really more fact intensive.  
18 And there isn't a dispute as to the, you know, the elements of  
19 these matters.

20 But it is interesting that the Plaintiffs, you know,  
21 generally ignore all of the cases that we cite to. One which  
22 is Hall vs. G.E. Plastic, where the Court said that the focus  
23 on the prior success or judicial acceptance requirements is to  
24 minimize the degree of a party contradicting a Court's  
25 determination, based on a party's prior position. That's the

1 whole point of the exercise. You can't do this. You can't do  
2 this.

3 Just quickly, that leaves the individual arguments as to  
4 each of the five causes of action and I just want to go through  
5 some highlights. There's a negligence claim, Your Honor. And  
6 we did not file a pleading, but the Court can certainly take  
7 judicial notice of the fact that the effective date has  
8 occurred. Under the effective date, the plan is now effective.  
9 That includes the exculpation clause, as Mr. Pomerantz, I think  
10 accurately and without contradiction pointed out earlier, the  
11 exculpation clause applies specifically to the debtor and to  
12 negligence claims. And that's not a matter that's at all  
13 subject to appeal.

14 So I think just to add to the arguments that we have  
15 in our papers, which I adopt and do not abandon for any  
16 purpose, I would add to the argument on negligence, that it's  
17 now precluded, as a result of the plan becoming effective.

18 The fiduciary duty count suffers from numerous defects. I  
19 just want to point out a couple of them. They don't respond to  
20 the argument under Corwin, that under the Advisor's Act, there  
21 is no private right of action to sue for damages arising from a  
22 breach of fiduciary duty. This claim rears its head in  
23 virtually every single complaint. They've never addressed  
24 Corwin. Corwin is binding on this Court, and it is unambiguous  
25 that there is no private right of action to sue for damages for

1 breach of fiduciary duty under the Advisor's Act.

2           They ignore Goldstein. Goldstein is not from the  
3 Fifth Circuit, but it's very persuasive authority that advisors  
4 do not owe fiduciary duties to their individual investors.  
5 Instead, they owe fiduciary duty to their client. Their client  
6 is the entity with whom they're in contractual privity. And so  
7 in this case, there's no fiduciary duty there, either.

8           The breach of contract claim. Again I just -- I  
9 would just say quickly, Your Honor, it's barred under judicial  
10 estoppel. Even if it wasn't, it's clear based on Mr. James'  
11 analysis and admission that the debtor's, or the reorganized  
12 debtor's interpretation of 6.2 is accurate. And you know, I  
13 said this in the beginning. Now let me tie it in a bow because  
14 the breach of contract claim, and the tortuous interference  
15 claim are both tied to the same thing. And that is the  
16 assertion that the Plaintiffs had a right under the membership  
17 agreement, a right of first refusal.

18           And they basically say that the debtor was playing  
19 games. That they shouldn't be able to get through 6.2 by  
20 assigning it to an affiliate. And that's where I go back, Your  
21 Honor, and just remind the Court that the debtor told the whole  
22 world exactly what they were doing in their motion. And their  
23 objections, Mr. Dondero and the Trusts both acknowledge to the  
24 whole world that they understood exactly what was happening.

25           In fact, their concern was not that it was going to

1 the debtor, but that it might be going to an affiliate outside  
2 of the bankruptcy court's jurisdiction. And for them to now  
3 say, having taken all of those positions -- talk about  
4 inconsistent positions. They should be barred from saying  
5 today, that the use of an affiliate to effectuate the  
6 transaction was wrongful, because they actually told the Court  
7 that they needed to -- that the Court needed to make sure that  
8 it had jurisdiction over the very entity they now say somehow  
9 shouldn't have been allowed to get the asset.

10 It's a bit much. So that takes care of the tortuous  
11 interference.

12 The RICO claim, Your Honor, again is a motion.  
13 There's so many different aspects to it. But I don't think the  
14 Court needs to get past the Supreme Court holdings in HJ, Inc.  
15 Again, just simply ignored by the Plaintiffs in their  
16 opposition to the motion to dismiss. In HJ, Inc., the Court --  
17 the Supreme Court did an exhaustive analysis to try to  
18 determine and ultimately did determine, what a pattern of  
19 racketeering activity meant. And the Supreme Court came to the  
20 following formulation. That it had to have two or more  
21 predicate related offenses that amounted to a threat of  
22 continued criminal activities.

23 You know, the notion here is that the debtor and Mr.  
24 Seery engaged in insider trading. We've already -- I've  
25 already mentioned that according to the complaint, which the

1 Court can take as true. Mr. Dondero, himself, was the tippee.  
2 But be that as it may, they don't come close to meeting the  
3 very high standards set forth by the Supreme Court in HJ, Inc.  
4 to show that whatever conduct Mr. Seery and the debtor engaged  
5 in, and if you take the allegations as true, in not telling  
6 what the fair value of the asset was, that that doesn't amount  
7 to a hill of beans for purposes of RICO. That you don't have  
8 any, I think predicate acts. I think here's the Court,  
9 predicate acts extending over a few weeks or months,  
10 threatening no future criminal conduct, do not meet RICO  
11 pleading grounds. Right.

12 Security fraud claims cannot be predicate acts for  
13 purposes of RICO. That is also clear. And that is really, I  
14 mean they say mail, wire and fraud. But what's really at heart  
15 is the 10(b)(5). Okay, it's the 10(b)(5) claim. Again, Mr.  
16 Seery being -- I mean Mr. Dondero being the tippee. But those  
17 are just some of the reasons.

18 None of, you know, that the RICO claim fails. You  
19 know, I'll otherwise rely on the papers, unless the Court has  
20 specific questions as to any of the other pieces of the motion  
21 to dismiss the RICO claim, or any other aspect of the  
22 Defendants' motion. I think this is clear. I think we win, no  
23 matter how you slice it. It's just wrong. It's just wrong.

24 This Court will never, ever have a final order if Mr.  
25 Dondero is able to engineer complaints such as this, which seek



1 to assert claims that absolutely positively could have and  
2 should have been brought at the time the debtor made its  
3 motion.

4 Unless the Court has any questions, I have nothing  
5 further.

6 THE COURT: I do not. All right.

7 Mr. Sbaiti, I'm going to let you have as much time as  
8 Mr. Morris. He took 55 minutes. As I mentioned, I have a hard  
9 stop at 12:00 to do a swearing in ceremony. So if you're not  
10 finished in 40 minutes, then I'm going to have to take a break  
11 and come back and let you finish. All right?

12 MR. SBAITI: Thank you, Your Honor. Although I don't  
13 think I'm going to be much longer than 35-ish minutes.

14 THE COURT: Okay.

15 MR. SBAITI: if not less.

16 THE COURT: Okay.

17 MR. SBAITI: I think you'll be able to be done by --  
18 we'll be able to be done by noon.

19 THE COURT: All right. Thank you.

20 MR. SBAITI: Thank you, Your Honor. Your Honor, may I  
21 share my screen?

22 THE COURT: You may.

23 MR. SBAITI: Thank you, Your Honor. Do you see my  
24 Power Point, Your Honor?

25 THE COURT: I do.

1 MR. SBAITI: Thank you, Your Honor. I don't know  
2 what which one you see. Is it the --

3 THE COURT: I see presentation.

4 MR. SBAITI: With the full page?

5 THE COURT: Yes, uh-huh.

6 MR. SBAITI: Okay, yeah, great. I just want to make  
7 sure we're on the right page. Thank you, Your Honor. So Your  
8 Honor, the defendant debtor is a registered investment advisor.  
9 And it all begins with that. And this where the distinctions  
10 between what happened in the 9019 and I'll get to the elements  
11 of res judicata through argument.

12 But the first thing that has to be identified is that  
13 the Defendant is a registered investment advisor. The  
14 objection filed by Holdco back during the 9019 was an objection  
15 against HarbourVest selling its interest by filing the right of  
16 first refusal. It did not deal with the investment advisor  
17 feature of Highland's relationship. And I'll get to why the  
18 9019 doesn't preclude these arguments today.

19 This is essentially the structure. Highland was the  
20 investment advisor of HCLOF, and Holdco is an investor in  
21 HCLOF. And so Highland would owe a fiduciary duty under the  
22 Advisor's Act against -- to CLO Holdco.

23 Highland also had a direct advisor relationship with  
24 the DAF. And so under the Investment Advisor's Act, it owed  
25 fiduciary duties to both of those entities. The law governing

1 registered investment advisors is that it's a federally  
2 recognized and defined fiduciary duties. The fiduciary duty to  
3 there's a fiduciary duty to affirmatively keep the advisee  
4 informed and the fiduciary duty not to self-deal, i.e., not to  
5 trade ahead of an advisee and opportunity that an advisee would  
6 want or expect and without the advisee's expressed informed  
7 consent.

8           This is a federally recognized and defined fiduciary  
9 duty and it's actionable under state fiduciary duty laws.  
10 While Mr. Morris ended his argument by saying we didn't deal  
11 with their case law saying that there's no private right of  
12 action under the Advisor's Act, the fact of the matter is that  
13 Judge Boyle, about ten years ago, found that a state -- the  
14 breach of fiduciary duty claim can be predicated on breaches of  
15 federally imposed fiduciary duties under the Advisor's Act.  
16 And that's what Douglass v. Beakley held. And that's actually  
17 what we cited in our response. So I'm not sure why he would  
18 argue that we haven't addressed the issue of where does this  
19 private right of action come from.

20           Federal Law supplies the rules of the relationship  
21 and State Law provides the cause of action for those breaches.  
22 Now the scope of that has been expounded upon by many cases.  
23 The Fifth Circuit held in Laird, as a fiduciary, the standard  
24 of care to which an investment advisor must adhere imposes an  
25 affirmative duty of utmost good faith and full and fair

1 disclosure to all material facts, as well as an affirmative  
2 obligation to employ reasonable care to avoid misleading his  
3 clients.

4           The word "affirmative" there is important because it  
5 means the investment advisor is not supposed to wait to be  
6 asked. The investment advisor as an affirmative duty to  
7 proactively provide the information to the client.

8           The next standard comes from the SEC. We call it the  
9 SEC interpretation letter. It's a release that came out in  
10 2019. And to meet it's duty of loyalty, an advisor must make  
11 full and fair disclosure to its clients of all material facts  
12 relating to the advisor relationship. Material facts relating  
13 to the advisor relationship include the capacity at which the  
14 firm is acting with respect to the advice provided.

15           The SEC had another release in 2000 -- or excuse me,  
16 in that same release, the SEC said the duty of loyalty requires  
17 that an advisor not subordinate its clients interests to its  
18 own. In other word, an investment advisor must not place its  
19 own interest ahead of its clients' interests. An advisor has a  
20 duty to act in the client's best interest, not its own.

21           The SEC general instruction three to part 2 of Form  
22 ADV, that every investment advisor has to pull out. And this  
23 is cited in our papers. As a fiduciary, you must also seek to  
24 avoid conflicts of interest with your clients, and at a  
25 minimum, make full disclosure of all material conflicts of

1 interest between you and your clients that could affect the  
2 advisor relationship. This obligation requires that you provide  
3 the client with sufficiently specific facts, so that the client  
4 is able to understand the conflicts of interest you have, and  
5 the business practices in which you engage, and can give  
6 informed consent to such conflicts or practices or reject them.

7 And, finally, the Third Circuit in Belmont said:

8 "Under the best interest test, an advisor may benefit  
9 from a transaction recommended to a client if, and  
10 only if, that benefit, and all related details of the  
11 transaction are fully disclosed."

12 These fiduciary duties are unwaivable by the advisor.  
13 Any condition, stipulation or provision binding any person to  
14 waive compliance with any provision of this subchapter, or with  
15 any rule, regulation or order thereunder shall be void.

16 So the lawsuit does not allege that the HarbourVest  
17 settlement should be undone or unwound. I'd like to move to  
18 that point. Mr. Morris says well, you have to unwind half of  
19 the settlement. Maybe HarbourVest doesn't have to give back  
20 what it got, but Highland would still be saddled with the cost  
21 of the settlement, but not with the benefit of the settlement.

22 Well, actually that's not true. There's two points  
23 that we would make on that. Number one, our suit is a suit for  
24 damages. In other words, the suit would be a suit for money  
25 damages, based on the difference between the value of the asset

1 and what HarbourVest or what the actual value of the asset that  
2 was represented, \$22.5 million. So the second point, though,  
3 is that even under a situation where CLO or Holdco or the DAF,  
4 or even HCLOF were to purchase the HarbourVest suit, the  
5 expectation would obviously be that they'd pay the \$22.5  
6 million that Highland paid for it.

7           So Highland is -- so it's not unwinding, and there's  
8 no saddling Highland with a burden that they didn't otherwise  
9 have, I think that's a misrepresentation. But we're not  
10 seeking to unwind the lawsuit -- or excuse me, unwind the  
11 settlement.

12           Now Mr. Morris is correct, the representation of  
13 value by Mr. Seery is -- is one of the main points here. And  
14 the representation was that the value of the entire asset. Not  
15 just the shares of MGM, but the value of the entire asset was  
16 \$22.5 million. So in other word, nearly half of HCLOF was  
17 represented to be worth \$22.5 million. It was argued by  
18 counsel on Page 14 of the January 14th transcript, and then on  
19 Page 112 of that transcript, Mr. Seery specifically says the  
20 current value is right around \$22.5 million.

21           Now that was also in some of the filing papers and  
22 Mr. Morris put up the evidence to Your Honor that Mr. Pugatch,  
23 on behalf of HarbourVest also parroted that number. But  
24 there's not any evidence today about where that number came  
25 from, or whether he was simply relying on Highland's

1 representation of that value.

2 Now as a general rule, in these 12(B)(6) motions, as  
3 I said before, we don't look at the evidence because the whole  
4 point of discovery is to find out what's behind a lot of the  
5 evidence. That's been quoted. The amount of evidence that  
6 went into the 9019 motion as not necessarily full-blown  
7 discovery.

8 I understand Mr. Morris saying well, they could have  
9 asked the question. But as I just showed you, they shouldn't  
10 have to ask the question. There should be fair and full  
11 disclosure of all the material facts. And if it turns out,  
12 which we believe it is true, that by January, the value of  
13 HCLOF was twice what it was represented, or the HarbourVest  
14 portion of HCLOF was twice as to what it was represented,  
15 that's a material omission that Highland had an affirmative  
16 duty to not misrepresent. Irrespective of the questions being  
17 asked.

18 The DAF found out later on that the representation of  
19 the value wasn't true. Now Mr. Morris talked for a very long  
20 time about all the opportunities that somebody, Mr. Dondero,  
21 somebody other than CLO Holdco. In addition to CLO Holdco,  
22 could have asked the magic question to find out whether or not  
23 they were telling the truth. But that runs right in the face  
24 of the standards set forth by the SEC and by the Courts as to  
25 the affirmative obligation of an advisor to disclose all the

1 material benefits that they're going to get as part of a trade.  
2 The idea being that when you're a registered investment advisor  
3 and you want to engage in a transaction, you make a full  
4 disclosure and say this is the transaction. It's worth 41, but  
5 I'm paying 22-1/2. But here's why I'd like to be able to do  
6 it. And then that's the discussion that happens.

7           That clearly didn't happen here. And when it turned  
8 out that there was this entirely huge upside that they were  
9 gaining the benefit of, and maybe HarbourVest didn't care, that  
10 that was a false statement. Now the reason we don't have a  
11 common law fraud claim, or that we don't necessarily hang our  
12 hat on a fraud claim is we don't have enough evidence as it  
13 stands today, to specifically say that Mr. Seery intentionally  
14 misrepresented that. Although we believe that it was grossly  
15 reckless of him to do so. But we don't really need a fraud  
16 claim with a gross recklessness standard. We have a breach of  
17 fiduciary duty, which basically gets us to the same place.

18           So the timeline we have is September 30th was the  
19 last valuation of HCLOF assets provided by HCMLP. And the  
20 value of HCLOF, at that time, or the HarbourVest of that value,  
21 would have been about 22.5 million. So what it appears to be  
22 is that in January or in late December, the valuation that was  
23 being done -- what was being reported, wasn't the current  
24 valuation. It was the valuation as of the end of the third  
25 quarter of 2020.



1           On December 22nd, the motion to approve the  
2 settlement with HarbourVest was filed. HCMLP should have had  
3 or would have had up-to-date valuations of the HCLOF assets,  
4 but didn't necessarily disclose them as being different than  
5 the 22.5 million. On January the 14th, Your Honor, held the  
6 9019 hearing. And then that same day, Your Honor entered the  
7 approval order.

8           And finally, in March, the DAF learns the true value  
9 of HLOF assets as of January 2021 and starts to look into it.  
10 Now Mr. Morris makes much of the fact that well, Mr. Dondero at  
11 least knew that he had tipped them off, Mr. Seery. And if you  
12 actually read Paragraph 127, you'll see specifically what it's  
13 purported that he said. He said stop trading in the MGM  
14 assets, because MGM might be in play. So you can't trade  
15 because I'm an advisor, Mr. Dondero's an insider, he's the  
16 tipper, not the tippee. Mr. Seery becomes the tippee under  
17 that theory of the case, and he has to, and is required to,  
18 because of their affiliation at the time, he's required to  
19 cease trading. And that was the purpose of saying that.

20           The collateral issue that we point is that he at the  
21 very least knew about that, and that should have caused him to  
22 revalue, if he hadn't done so at the time. Not that, knowing  
23 that alone is sufficient to know what the value of HCLOF  
24 actually was on that date. That's a complete misrepresentation  
25 of the point and purpose of that allegation.

1 And as Your Honor knows, under 12(B)(6)  
2 jurisprudence, the way this is supposed to go is we get the  
3 benefit of every inference based upon the allegations, not the  
4 movant. So the first violation is that the debtor as an IRA  
5 failed to affirmatively disclose the true current valuation of  
6 HCLOF and failed to keep the DAF and CLO Holdco reasonably  
7 informed of the value of the assets.

8 And the debtor as an IRA, failed to obtain CLO  
9 Holdco's with the DAF's informed consent before it traded in  
10 the asset, because it didn't have all of the information. The  
11 typical remedy for breach of fiduciary duty is typically  
12 damages for any loss suffered by the Plaintiff as a result of  
13 the breach. I don't think there's a debate there.

14 So now we get to Mr. Morris' key argument. His key  
15 argument is that we should be talking about res judicata. The  
16 elements of res judicata and I think we agree is you have to  
17 have identical parties in the action; the prior judgment was  
18 rendered by a Court of competent jurisdiction; the final  
19 judgment was final on the merits, and the cases involved the  
20 same causes of action or the same transaction and nexus of  
21 facts.

22 Now I'm going to skip to three, because I think  
23 that's one of the key points that we disagree with them on.  
24 There is no case, Your Honor, that we could find, and no case  
25 that I read them citing that says an order on an 9019 has

1 preclusive effect under res judicata under an objector to the  
2 settlement. We looked. We looked in the Fifth Circuit. We  
3 looked outside of the Fifth Circuit. No District Court, no  
4 Fifth Circuit Court of Appeals' opinion we could find held that  
5 a 9019 order has res judicata effect on an objector's  
6 objection. And I think the reason is pretty simple. Is it  
7 doesn't.

8           Because the Plaintiff's claims, here our claims  
9 hadn't even accrued. We have a four year statute of  
10 limitations, but I think more importantly is that, as the Fifth  
11 Circuit said, the 9019 motion grants the Court discretion.  
12 It's not supposed to be a mini trial. The Court can approve a  
13 settlement over even the valid objection of an objector. It's  
14 not a trial on the merits. It's not supposed to be a trial on  
15 the merits. It's not supposed to be a disposition on the  
16 merits.

17           So the fact that Your Honor could have approved the  
18 9019 settlement with HarbourVest, even if we had a valid  
19 objection, means this isn't a disposition on the merits, as res  
20 judicata would envision. It wasn't a trial on the merits, even  
21 though it was withdrawn.

22           The other elements that we would point out to is that  
23 neither the DAV nor Holdco were parties to the dispute between  
24 HarbourVest and Highland. And this keys off of the issue that  
25 I just raised. The cases that are cited by the debtor to Your

1 Honor all have to do with where one of the settling parties is  
2 trying to undo the settlement for some collateral reason. And  
3 the Courts have held, no, that's res judicata, because you were  
4 a party to the action. HarbourVest brought the claims against  
5 Highland. Highland settled those claims.

6 CLO Holdco was collateral to that settlement, it's  
7 not a -- excuse me, collateral to that dispute. It's not a  
8 party to that dispute. Its claims weren't being resolved by  
9 the settlement. And while you have a notice to all creditors  
10 and those objections can be raised, there was not inherently  
11 any manner for resolving those objections on their own merits.  
12 Only -- it was only resolved in so far as deciding whether or  
13 not the settlement was in the best interest of the debtor,  
14 which Your Honor decided, and we don't challenge that. But we  
15 do argue that it caused damages and the debtor shouldn't get  
16 off for those damages.

17 The fourth element is that the --

18 THE COURT: Just for the record, the standard in a  
19 9019 context is not best interest of the debtor, right?

20 MR. SBAITI: Your Honor, I mean that's what the rule  
21 says and Your Honor's order --

22 THE COURT: That is not what the rule says. The rule  
23 is actually very sparsely worded and then we have Fifth Circuit  
24 case law and U.S. Supreme Court law that talk about what the  
25 standard is.

1 MR. SBAITI: Yes, Your Honor. And there are five --

2 THE COURT: And it's -- is it fair?

3 MR. SBAITI: There are five elements.

4 THE COURT: Is it fair and equitable and in the best  
5 interest of the estate given a long list --

6 MR. SBAITI: Correct, Your Honor. And I didn't mean  
7 to --

8 THE COURT: -- of considerations that the Court is  
9 supposed to consider that "bear on the wisdom of the  
10 settlement." Okay. So it's actually much more involved, is my  
11 point, than is it in the best interest of the estate. Is it in  
12 the best interest of the estate and fair and equitable given  
13 all factors bearing on the wisdom of the compromise? And then  
14 we have a long laundry list of things the Court should consider  
15 as part of that analysis.

16 MR. SBAITI: That's a --

17 THE COURT: I just bring that up because if I'm still  
18 -- my brain is still stuck five minutes ago on your comment  
19 that you can't find any case saying that an order approving a  
20 9019 compromise has res judicata effect on creditors. And it's  
21 -- let me just say it's shocking to me that someone would argue  
22 otherwise. Bankruptcy is a collective proceeding --

23 MR. SBAITI: Your Honor --

24 THE COURT: -- where creditors can weigh in and  
25 object and raise whatever arguments they think the Court should

1 consider that bear on the wisdom of the compromise. And the  
2 Fifth Circuit in Foster Mortgage has said the Court should give  
3 great deference to the views of the creditors, the paramount  
4 interest of creditors.

5 So it's a really sort of shocking proposition that  
6 the order approving a 9019 compromise wouldn't have res  
7 judicata effect on all parties and interests who got notice of  
8 that. So if you have any elaboration on that, I'd like to hear  
9 it.

10 MR. SBAITI: Your Honor, we looked at the Fifth  
11 Circuit cases that they cited, which I believe included that  
12 case. And even in that case, the point that we made in our  
13 papers and the point I was trying to arrive at is that among  
14 the factors, yes, the Court should give great deference to the  
15 creditors. But among the factors is not that the objections  
16 lack merit or are meritless or that they wouldn't be winnable  
17 if they were simply standalone claims.

18 And that was really the only point I was trying to  
19 make is that Your Honor has discretion. Granted it's -- as you  
20 mentioned, it's not unfettered discretion. It's bounded by  
21 standards and there are -- there is, I know, about five  
22 standards Your Honor has to consider or the Court has to  
23 consider. But among those, that laundry list of standards, is  
24 not that the Court finds that any objection lacks merit. And  
25 that was really the only point I was making.

1           And in terms of the case law, we looked at the Fifth  
2 Circuit. We looked, frankly, outside the Fifth Circuit as much  
3 as we could, and because this is actually not an easy one to  
4 research, as it turned out, despite the language. And we also  
5 looked for district court opinions in the Fifth Circuit to see  
6 did any district court or did any court of appeals give this  
7 type of approval to the standard that a 9019 order has res  
8 judicata effect on a claim raised in an objection by a  
9 creditor.

10           And we couldn't find any and I read all the cases  
11 that Mr. Morris cited in his papers, and they didn't cite one  
12 that explicitly said that. They tried to drive at it through  
13 insinuation that, well, if the Court has to give great  
14 deference or if the Court has to take into account the  
15 underlying facts and the fact that there is discovery, surely  
16 that must mean this is akin to the trial on the merits. And I  
17 think that's where we simply disagree in good faith. I'm not  
18 ascribing any bad intention. But we disagree that that's where  
19 the law goes.

20           Res judicata is not -- while it's supposed to stop  
21 the relitigation of issues, it is predicated on there having  
22 been actual litigation of those issues. And when HarbourVest  
23 and Highland settle a case and my clients show up with an  
24 objection, even though they withdraw an objection, that, in our  
25 opinion -- and we're asking the Court to see it our way -- is

1 not trial on the merits. It's not a disposition on the merits  
2 of the objection in and of itself. Some objections we can --

3 THE COURT: But the context matters. In the context  
4 of a 9019 compromise, the hearing is about look at the bonafide  
5 ease of the settlement. And it's either fair and equitable and  
6 in the best interest of the estate or not. And an objector can  
7 say this is a terrible settlement and here's why it's a  
8 terrible settlement and let me cross-examine the movant and let  
9 me put on my own witness that will enlighten the Court as to  
10 why this is a terrible settlement, why I say terrible, why it's  
11 not fair and equitable.

12 That's your chance to convince the Court, don't  
13 approve this settlement because there are, you know, 14  
14 problems with it. And if you convince the Court, then you  
15 convince the Court and it's not approved. If you don't, you  
16 appeal, and we do have an appeal of the settlement order.

17 So, again, I'm not understanding the "res judicata  
18 doesn't apply" argument.

19 MR. SBAITI: Your Honor, if I could riff on two  
20 points based upon what you just said, if I could address those.

21 The first is there are clearly two kinds of  
22 objections that get -- at least two kinds of objections that  
23 get raised in these 9019 approval hearings. The two that you  
24 heard recounted, some were this is bad for the estate. There's  
25 reasons why we don't think the estate will benefit from it and



1 it will be harmed from it.

2 And those types of objections, which I believe mostly  
3 comprise the objections that Mr. Morris was talking about  
4 because they are concerns for the estate. And so creditors who  
5 want to get money from the estate are concerned that the  
6 settlement will not enter (phonetic) to the benefit of the  
7 estate, and therefore, not enter to their benefit as creditors.  
8 That's number one.

9 But those don't adhere in a lawsuit. Those aren't  
10 claims for damages that the settlement is going to create for  
11 the person objection or for the party objecting. There's a  
12 whole separate set of objections similar to the ones HCLCO  
13 Holdco raised where that what inheres in the objection is this  
14 is actually going to cause us some kind of damage.

15 And so, the factors though, don't require the Court  
16 in those second set of instances to say, well, you know what?  
17 Not only do I think you're wrong, but I think that your  
18 lawsuit, the underlying causes of action that give rise to this  
19 objection, have no merit on their own face, that the discovery  
20 is not there to support them, that a jury is not going to find  
21 there. I am now the trier or the Court is now the trier of  
22 fact on the merits of the underlying causes of action that  
23 animate the objection.

24 And that's where I believe we're diverging with the  
25 debtor on the law. It goes too far to say that a 9019 hearing

1 where the Court in the end has discretion to approve it, even  
2 over a meritorious objection by any party, regardless of what  
3 bucket of objections the objection falls into. It goes -- our  
4 argument today, Your Honor, and we're asking the Court to see  
5 it our way, is that that would go too far. That an actual  
6 cause of action shouldn't be eradicated simply because of the  
7 9019 process because, as you pointed out, the Court does have  
8 to go through a litany of factors.

9 And if the Court determines that it's fair and it's  
10 more equitable to overrule the objection, the Court has that  
11 discretion. And we're not here to unwind that discretion.

12 But the settlement process did violate certain  
13 obligations and did cause my client damages. And that's what  
14 we're saying isn't precluded.

15 THE COURT: Okay.

16 MR. SBAITI: The fourth element, Your Honor, which I  
17 guess in many ways maps on to the argument I just made to Your  
18 Honor is that the cases, the underlying cases, do not involve  
19 the same claims. Plaintiffs' claims arise from the settlement  
20 process itself and not from the underlying issues being settled  
21 between HarbourVest and Highland. So that's why we think at  
22 least three of the four elements aren't met here. And we'll  
23 reserve on the papers, you know, whether jurisdiction was  
24 applicable because I think that's probably water under the  
25 bridge at this point in the oral argument.

1           Now, Mr. Morris attacks the case that we cite,  
2 Applewood Chair vs. Three Rivers Planning. And he argues that,  
3 well, this is not applicable. And the argument he made however  
4 was he put it in the context of, well, the parties there, the  
5 issue was you had guarantors who were not parties in their  
6 capacity as guarantors. But that's not actually what the Court  
7 held.

8           The Court didn't say that the release wasn't  
9 applicable to them because they didn't appear as parties in  
10 their guarantee capacities. They -- the Court held that, well,  
11 the specific discharge language doesn't enumerate those  
12 specific guarantees, and so therefore it's not released.

13           And where this dovetails, we believe, as closely as  
14 we can, this isn't a 9019 case. This is a final confirmed  
15 plan. But where it dovetails with what our argument is, is  
16 that the Court there as well was essentially saying the  
17 underlying causes of action weren't really presented to us, so  
18 we're not -- we -- and the confirmation of the plan didn't  
19 involve disposing of them, so we're not going to say that they  
20 are precluded. And we think that that's as close an analogy as  
21 we've found in the Fifth Circuit to the issues here today.

22           So I would say, Your Honor, that we believe that  
23 dispenses with the res judicata argument. The judicial  
24 estoppel argument, they conflate the language. I'll go back to  
25 this for a second. They conflate the language of judicial

1 estoppel on the success of the claim. None of the cases they  
2 cite on judicial estoppel involved where a party took a  
3 position, withdrew their argument, and then the Court moved on.

4           Mr. Morris tries to convert a judicial estoppel claim  
5 into a judicial reliance claim, which is not the purpose of the  
6 doctrine and is not the doctrine at all. The doctrine is that  
7 if you take a successful position in one court, you can't take  
8 the opposite position in another court. CLO Holdco didn't take  
9 a successful position in one court and then change its position  
10 later on. In fact, its positions, as Mr. Morris stated, are  
11 remarkably similar. They're not inconsistent, which is the  
12 problem with their judicial estoppel argument. And we -- I  
13 think we fairly briefed that in our papers and we'll otherwise  
14 rest on the papers.

15           To deal -- to address the actual claims, again, I  
16 come back to the idea of a fiduciary duty claim, which is our  
17 lead claim. And to be clear, it's a state claim predicated on  
18 the violation of federally imposed fiduciary duties.

19           And I'm looking for a clock to make sure I'm not  
20 abusing Your Honor's time, and I don't have one right in front  
21 of me because my screen -- my screen is up.

22           Your Honor, the Douglass v. Beakley case is, like I  
23 said, is Judge Boyle's case. It specifically provides a cause  
24 of action based upon violations of the Advisers Act. We also  
25 cite about four or five other cases in footnote 8 of our

1 response from other circuits, including the Third Circuit, the  
2 Belton case that I referred to earlier, all of which held that,  
3 yes, a state fiduciary duty claim can be predicated on breaches  
4 of a federal Advisers Act violation.

5           The other point that they make on the fiduciary duty  
6 claim is they argue HCMLP doesn't owe fiduciary duties to CLO  
7 Holdco. And the cases they cite, Your Honor, we dealt with in  
8 the papers why they were distinguishable, because in those  
9 cases they were dealing with the fact that there wasn't any  
10 harm or any direct relationship. But what they ignore is the  
11 actual language of the Advisers Act, which is important.

12           Well, first of all, Mr. Seery admitted in his own  
13 testimony during the approval hearing in July of 2019 that he  
14 says, "We owe." He says, "There are third party investors in  
15 the fund -- in these funds who have no relation whatsoever to  
16 Highland, and we owe them a fiduciary duty both to manage their  
17 assets prudently, but also to seek to maximize value." I think  
18 Mr. Seery was absolutely correct when he said that. Highland  
19 owes fiduciary duties to the investors in the funds that  
20 Highland manages. The core of our case is that Highland is  
21 using or abusing the assets of the funds it managed in HCLOF  
22 for its own enrichment, which is a classic breach of fiduciary  
23 duty case under the Advisers Act.

24           Now -- excuse me. The other point that I would say,  
25 Your Honor, is that there is a statutory basis for us to argue

1 a breach of fiduciary duty. Excuse me. I didn't mean to stop  
2 sharing. I apologize.

3 Are you back with me, Your Honor, on my --

4 THE COURT: Yes.

5 MR. SBAITI: -- PowerPoint?

6 THE COURT: Yes.

7 MR. SBAITI: Sorry about that, Your Honor. I just  
8 hit the wrong thing. I'm not very technologically savvy. Here  
9 we go.

10 So Holdco is an investor in HCLOF, which is a pooled  
11 investment vehicle. A pooled investment vehicle under the case  
12 law we cite is simply defined as an investment vehicle that  
13 doesn't publicly solicit investors and has few than 100  
14 investors. Highland advises it. That's the same holding in  
15 TransAmerica Mortgage, by the way, which we also cite.

16 15 U.S. C. Section 80(b)(6) establishes the federal  
17 fiduciary standards to govern the conduct of registered  
18 investment advisers. That's also the TransAmerica case. 15  
19 U.S.C. Section 80(b)(6)(D) delegated to the SEC the power to  
20 decide the scope of those duties that are imposed under the  
21 statute. And so the SEC enacted 17 C.F.R. Section 275.206(4)-  
22 8.

23 And it expressly states, and we cite the statute or  
24 the regular in full in our papers, that the fiduciary duties  
25 are owed to investors in the pooled investment vehicles. It

1 specifically says that. It talks about two different duties  
2 owed and they're owed to the investors in the vehicles, which  
3 means they're owed to Holdco as an investor in HCLOF, which is  
4 the vehicle that Highland manages.

5 It's black and white in the regulation. And we  
6 haven't seen any response. There was no response of that in  
7 the reply that was filed, Your Honor. And so the argument that  
8 there's not a fiduciary duty owed to Holdco because it's merely  
9 an investor in HCLOF simply doesn't comport with the law.

10 And finally, the petition lays out the basis for our  
11 claims including the applicable federal and state law.  
12 Plaintiffs' response lays out why the legal arguments aren't  
13 opposite at the 12(b)(6) stage and Rule 9(b) is met where  
14 necessary under the federal claim. And I'm trying to unshare  
15 so that I can get back to regular argument.

16 I'd like to briefly address Mr. Morris' argument,  
17 Your Honor. Your Honor, I re-raise my argument that I made  
18 before, which is that a 12(b)(6) motion and hearing is not the  
19 appropriate time for all the evidence that was poured in here.  
20 And I understand Mr. Morris' contention, well, it's really hard  
21 to ignore all the history of this case. But a lot of that  
22 history really boils down to things that were actually admitted  
23 in the complaint. The complaint recognized there was a 9019.  
24 But what Mr. Morris wants to do is go beyond that and to go to  
25 what people said and what they must have meant. What Mr.

1 Dondero must have meant in his objection, what Dugaboy must  
2 have meant by their objection, what Mr. Pugatch must have meant  
3 by his testimony.

4 All of that is highly improper at this stage of the  
5 proceeding, Your Honor. It's outside of the 12(b)(6) confines.  
6 It's outside the four corners of the complaint. And we object  
7 to all of that evidence being considered.

8 THE COURT: Let me --

9 MR. SBAITI: The question we --

10 THE COURT: Let me ask you about that procedural  
11 point.

12 MR. SBAITI: Yes, Your Honor.

13 THE COURT: As we know, 12(d) provides that if  
14 matters outside the pleadings are presented to and not excluded  
15 by the Court in a 12(b)(6) motion, the motion must be treated  
16 as one for a summary judgment under Rule 56 and all parties  
17 must be given a reasonable opportunity to present all the  
18 material that is pertinent to the motion.

19 Are you -- what are you arguing? That I should treat  
20 it as a motion for summary judgment and give you more time to  
21 present other materials? I mean, you both presented an  
22 appendix, okay. And I'm telling you we're seeing this more and  
23 more, I've noticed. People are going beyond the four corners  
24 of a motion to dismiss and attaching things. And there's some,  
25 you know, Fifth Circuit authority that says, well, if what is



1 attached is integral to understanding, you know, an allegation  
2 or whatever in the pleading, you know, there is some discretion  
3 to go outside the four corners.

4           So I'm trying to understand the point you're making  
5 with this. Are you saying I should treat it as a motion for  
6 summary judgment or do these attachments really -- you know, do  
7 I have authority under the Fifth Circuit to consider them as  
8 part of the 12(b)(6) motion or not?

9           MR. SBAITI: Typically, in our experience, Your  
10 Honor, is when a summary or when a 12(b)(6) is going to be  
11 treated as summary judgment under 12(d), the Court says that  
12 and then the parties are given an opportunity, as you said, to  
13 go do some discovery in order to put together the evidence and  
14 materials to then come back and respond as a summary judgment.  
15 We responded to a 12(b)(6) and objected to the evidence. If  
16 the Court wants to treat it as a summary judgment, then we  
17 would ask for an opportunity for -- to conduct discovery in  
18 order to be able to respond as a summary judgment motion, but  
19 we didn't -- because we responded to a 12(b)(6) --

20           THE COURT: You did the same thing though. You did  
21 the same thing in your response. You submitted an appendix of  
22 evidence, if you want to call it evidence. As someone pointed  
23 out, it's stuff from the bankruptcy court record. I don't  
24 think it went beyond what was already in the bankruptcy court.

25           MR. MORRIS: And if I -- can I be heard on this, Your

1 Honor?

2 THE COURT: You can. You can.

3 MR. MORRIS: Just to respond. This is really quite  
4 simple. The motion to dismiss is based on res judicata. Res  
5 judicata necessarily requires a review of what happened in  
6 connection with the prior hearing. There's nothing that we  
7 have identified or put forth in the appendix or on our exhibit  
8 list except for the pleadings in the 9019, the transcripts, the  
9 one deposition transcript, the one trial transcript, the  
10 settlement agreement, the transfer agreement. I'd love to know  
11 what the Court couldn't or shouldn't take judicial notice of.  
12 There is no emails. There is no -- there is no -- there is no  
13 extrinsic evidence, if you will. All of this is either on the  
14 docket or was presented as part of the hearing.

15 THE COURT: Yeah. I'm just trying to ferret --

16 MR. MORRIS: And it's necessary. And it's necessary  
17 for the motion.

18 THE COURT: Yeah. I'm just trying to ferret out the  
19 procedural position that's being asserted here. And I don't  
20 have the case cites off the top of my brain, but there is  
21 authority from at least the Northern District judges, if not  
22 the Fifth Circuit, saying in a 12(b)(6) motion I can take  
23 judicial notice of items in the record. And then, you know,  
24 there -- I know there's Fifth Circuit authority saying I can go  
25 beyond the four corners in a 12(b) context if it's just basic,

1 you know, explaining things that are in allegations. You know,  
2 such as --

3 MR. SBAITI: May I address that, Your Honor?

4 THE COURT: -- such as if a contract is in dispute,  
5 okay. Like there's no way you can have a cause of action under  
6 the contract and here's the contract. So I'm just trying to  
7 nail down your procedural position here.

8 MR. SBAITI: Your Honor, the distinction I was trying  
9 to make that I don't think I put as artfully as I might be able  
10 to put now is in a 12(b)(6) if there's a contract, as you said,  
11 if there's a legal document, a contract and order that's  
12 integral to the case, Your Honor can take judicial notice of  
13 that. Generally, a court can take judicial notice of filings  
14 in a bankruptcy, the fact that they were filed.

15 So the transcripts, which Your Honor can't take  
16 judicial notice of, is the truth of those. And that was what I  
17 was objecting to is it's one thing for him to say an objection  
18 was filed and therefore, because an objection was filed, that  
19 should be it. That was your only chance. I'm not saying Mr.  
20 Morris can't make that argument.

21 But when he goes beyond the fact of the filing or the  
22 fact that there was a transcript or the fact that there was a  
23 deposition and starts to read from the depositions or read from  
24 the filings and say this is what those mean, that goes against  
25 the 12(b)(6) parameters because, number one, now it's

1 substantive evidence and not simply a judicial notice of  
2 something that's right there in front of the Court, i.e.,  
3 something on its own docket. Because those statements and the  
4 interpretation of those statements are subject to credibility  
5 findings. They're subject to clarification. They're subject  
6 to rebuttal. That's the purpose of discovery.

7           And so if Your Honor -- and Mr. Morris is right.  
8 Usually, res judicata involves knowing what happened in the  
9 prior proceedings. So if all he wants to do is rest on the  
10 fact that an objection was filed by CLO Holdco and maybe even  
11 other people, and that should be it and he thinks that's enough  
12 for Your Honor to say res judicata applies, then I don't think  
13 we have a problem. It's when he goes beyond that and says,  
14 Your Honor, these people must have known and this is what they  
15 meant by their argument, that's what I'm asking Your Honor not  
16 to consider. And if Mr. Morris wants you to consider that,  
17 that's a summary judgment motion and we should have the  
18 opportunity to do discovery at the very least into the issues  
19 he has now raised as supporting his res judicata defense which  
20 he has the burden of proof on.

21           MR. MORRIS: Your Honor, this is one of the strangest  
22 arguments I have ever heard. I'm allowed to offer the Court  
23 and the Court is allowed to accept the documents, but I'm not  
24 allowed to read them. I'm not allowed to make arguments. I  
25 don't understand what that even means. If it were a contract,

1 I would be allowed to put the contract in front of Your Honor,  
2 but I wouldn't be able to argue why the contract doesn't say  
3 what the Plaintiff says. I don't get it.

4 THE COURT: Okay.

5 MR. MORRIS: That's --

6 THE COURT: Just I've heard enough on this. I don't  
7 think we have moved into Rule 12(e), that realm of me needing  
8 to treat this as a motion for summary judgment. I think the  
9 so-called evidence, the appendix that was attached to the  
10 motion as well as the appendix that was attached to Plaintiffs'  
11 response, it's stuff that I can take judicial notice of that's  
12 in the record of this Court and I can look at it. You know, it  
13 is what it is, the record of this Court.

14 All right. So I have nine people waiting in  
15 chambers. I'm trying to figure out should I take a break now  
16 or are you fairly close to wrapping up. Either answer is fine,  
17 Mr. Sbaiti. I just need to figure out who I make wait here.

18 MR. SBAITI: I have -- oh, I'm sorry. I didn't mean  
19 to interrupt you, Your Honor. I was just going to say I have  
20 five minutes left, but I know Mr. Morris probably wants to come  
21 back. So if you want to break now and we can come back at  
22 whenever the Court wants us to, we can do so.

23 THE COURT: All right. Why don't you make your final  
24 five minutes and then we'll take a break?

25 MR. SBAITI: Okay. Thank you, Your Honor.

1 I just wanted to address some of the arguments that  
2 Mr. Morris raised in his argument. The first thing is -- and I  
3 addressed this in part -- but Mr. Morris makes a big deal about  
4 paragraph 127 of the complaint and essentially suggests that  
5 we're the -- or that Mr. Dondero is the perpetrator of a  
6 nefarious scheme. Whereas, what the pleading actually says,  
7 and I again encourage Your Honor to re-read -- to read it  
8 specifically, is that Mr. Dondero warned Mr. Seery not to trade  
9 in the stock and not to make any transactions because the stock  
10 was going to appreciate in value.

11 That has two implications for us, Your Honor. Number  
12 one, it means Mr. Seery was a tippee of insider information,  
13 and number two, it means that Mr. Seery, if he did trade on  
14 that information or if he did pass that information on to  
15 someone else, that is a problem from the Advisers Act  
16 standpoint, which is really the only purpose of saying that.

17 While paragraph 127 also says that that should have  
18 caused Mr. Seery to revalue the NAV of HCLOF, it does not state  
19 and we did not plead that the entire value of HCLOF is tied to  
20 the MGM stock. So the insinuation that that somehow gave us  
21 inside information about what the true value of HCLOF was and  
22 we should have known or that Mr. Dondero should have known is  
23 simply untrue.

24 The other argument Mr. -- that Mr. Morris likes to  
25 harp on is that CLO Holdco withdrew its argument, but he

1 characterizes Mr. Kane's withdrawal testimony -- as he says,  
2 Mr. Kane admitted that CLO Holdco lacked the superior right to  
3 obtain the HarbourVest. If you read the very language that was  
4 highlighted on Mr. Morris' slide, that's not what Mr. Kane  
5 says. Mr. Kane says, "We've gone back to the drawing board.  
6 We've read your reply. And my client has given me permission  
7 to withdraw the argument or withdraw the objection." That's  
8 all he said. There was not an admission that he was wrong.  
9 There was not an admission that they had made a mistake. There  
10 was simply an admission that they decided to withdraw the  
11 objection for whatever reason.

12           Lastly, on the specific claims --

13           THE COURT: That's not an accurate description of the  
14 record. He said he looked at --

15           MR. SBAITI: Your Honor, I was reading it along with  
16 him.

17           THE COURT: -- Guernsey Law. And I don't know if his  
18 words were deep dive.

19           MR. SBAITI: Yeah.

20           THE COURT: But he had looked at the agreements  
21 extensively. That's just not what he said.

22           MR. SBAITI: And he said he was with -- Your Honor,  
23 he said he was withdrawing. He didn't say we were wrong. He  
24 didn't say we don't have a claim. What he said was, "We're  
25 withdrawing the objection."

1 THE COURT: After doing an extensive look at the  
2 agreements in Guernsey Law, okay, so.

3 MR. SBAITI: Sure. But, Your Honor, he might have --  
4 he could just as easily thought we have a chance, but it's not  
5 a good one. And frankly, we'll be here for 20 days and we're  
6 withdrawing it for that reason because we'll live to fight  
7 another day. Your Honor, there's an innumerable number. To  
8 simply say that he admitted that they didn't have a correct  
9 claim, it's just he didn't say that. That's all. That's the  
10 only point I'm making.

11 Your Honor, I don't disagree with the debtor that the  
12 Court's exculpation clause gets rid of the negligence claim  
13 which was obviously filed before the effective date, so that  
14 claim is gone.

15 And I think the last argument that Mr. Morris makes  
16 on the RICO claim is the federal court, the Supreme Court  
17 standard for pleading a RICO claim, that acts that only  
18 continue for a few weeks are not -- don't set out a RICO claim.  
19 Your Honor, in our response to that, we actually submitted an  
20 amended complaint that shows that the type of acts we're  
21 talking about, the pattern of the debtor using its investor  
22 vehicles assets to liquidate is a long pattern and practice  
23 than simply the HarbourVest suit. And so, we move to amend on  
24 that basis to satisfy that pleading defect, which is the main  
25 one that they focused on.



1 That's all I have, Your Honor.

2 THE COURT: All right. Thank you.

3 We're going to take a 15 minute break and come back.

4 I'll ask Mr. Jordan and Mr. Bessette did they have anything  
5 they wanted to say today. I know they joined in the debtor's  
6 motion. And then we'll let Mr. Morris have rebuttal.

7 All right. So we'll be back in 15 minutes.

8 THE CLERK: All rise.

9 MR. MORRIS: Thank you, Your Honor.

10 (Recess at 12:05 p.m./Reconvened at 12:23 p.m.)

11 THE CLERK: All rise.

12 THE COURT: All right. Please be seated.

13 We're back on the record in Charitable DAF v.  
14 Highland Capital. All right. So I promised I was going to go  
15 back to counsel for Highland CLO Funding, Ltd. So Mr. Jordan,  
16 Mr. Bessette, is there anything you wanted to say for oral  
17 argument?

18 MR. JORDAN: Thank you, Your Honor. John Jordan on  
19 behalf of HCLOF.

20 Our points are two procedural points. The first is  
21 as the Court anticipated, in our motion to dismiss filed back  
22 in August, we joined in the motion to dismiss of Highland. And  
23 so to the extent that the Court after deliberation is inclined  
24 to grant that motion, we would ask that as a joining party,  
25 HCLOF be pulled along with that.

1           The second procedural point is that back in our  
2 motion to dismiss, we pointed out that the complaint does not  
3 actually allege anything against HCLOF. In the story, we're  
4 essentially the football and neither Oklahoma nor UT. And we  
5 pointed that out as an additional argument to what you've heard  
6 today. That motion was never responded to. The deadline by  
7 agreement was extended to October 11th. And the lack of  
8 response was, we believe, not inadvertent but simply an  
9 acknowledgment that HCLOF is not a party that anything is being  
10 claimed against.

11           It particularly makes sense since effectively and in  
12 rough numbers, they're half owned by both sides. So for every  
13 dollar that HCLOF spends hanging around the case, the parties  
14 are paying essentially 100 cents collectively. So for that  
15 reason, we would ask, and subject to Mr. Sbaiti's input,  
16 whether the Court would ask us or direct us to upload an order  
17 granting our motion as unopposed. We just feel like we don't  
18 have any role in this case.

19           THE COURT: All right.

20           Mr. Sbaiti, what about that?

21           MR. SBAITI: Your Honor, they were originally added  
22 as a nominal party. And as a nominal party, because of the  
23 potential need to have a derivative action, I think that based  
24 upon Highland's arguments and the arguments that we had, I  
25 don't think the derivative action is necessary for us to

1 maintain on a go-forward basis. And so we don't oppose them  
2 being dismissed.

3 THE COURT: All right. Then I assume, Mr. Morris,  
4 you don't have any problem with this, correct?

5 MR. MORRIS: No, Your Honor.

6 THE COURT: Okay. So I'll look for the parties to  
7 submit an agreed order of dismissal of HCLOF after the hearing.  
8 All right?

9 MR. JORDAN: Thank you, Your Honor.

10 THE COURT: All right. Mr. Morris, you get the last  
11 word.

12 MR. MORRIS: Thank you, Your Honor. I hope to be  
13 relatively brief. I really just want to focus on the arguments  
14 concerning whether or not the order that was entered by this  
15 Court was an order that was entered on the merits.

16 As the Court is well aware, a 9019 motion filed by a  
17 debtor is done so on notice. It is to give all parties in  
18 interest an opportunity to be heard, not just as to whether or  
19 not the debtor meets its burden of proof under Rule 9019 but  
20 whether or not the Court can find, as it must, that the  
21 proposed settlement is in the best interest of the estate.

22 The purpose of -- I mean that is the purpose of the  
23 giving notice so that everybody has a chance to be heard. The  
24 questions that the Court asked, the questions that every  
25 bankruptcy court asks in a 9019 is can the debtor do this deal,

1 should the debtor do this deal, is it in the best interest of  
2 the estate to do this deal.

3 And, you know, the idea that a 9019 order is somehow  
4 res judicata only to the parties to a settlement is just  
5 something that doesn't make any sense to me because it  
6 abrogates so many rules that exist that allows and encourages  
7 and requires parties who have objections to be heard.

8 Mr. Sbaiti's clients filed an objection. They  
9 initiated a contested matter. They obtained rights. They were  
10 litigants. They are litigants in a contested matter where  
11 they're required to tell the Court what objections they have to  
12 the settlement, and they did that.

13 Mr. Sbaiti, you know, told me that I wasn't allowed  
14 to characterize the words that are used in the documents that  
15 have now been admitted by the Court. And, yet, I heard him say  
16 that maybe Mr. Kane (phonetic) really meant to tell Your Honor  
17 that he was withdrawing the claim because he was going to save  
18 it for another day.

19 I'd just ask the Court to look at the transcript. I  
20 don't have to interpret it at all. And I'd ask the Court to  
21 read the words. I can put them back up on the screen, but  
22 they're pretty short. It's at Pages 7 and 8 of the transcript  
23 of what Mr. Kane told you and what you said in response. It's  
24 on the page, not my interpretation, and what the import of that  
25 was.

1 Mr. Sbaiti believes, I guess, if one is allowed to  
2 engage in such conduct without consequence, that one is allowed  
3 to allow to file objections, cause the Court and the litigants  
4 to participate, to give discovery, to write briefs, to do  
5 analyses, withdraw it on the basis of their own good faith  
6 analysis of Guernsey law of the documents and somehow say it's  
7 irrelevant. Not what the law is, not what res judicata is  
8 intended to do.

9 He should have put all of his cards on the table. In  
10 fact, I think that Mr. Kane believed he was putting all of his  
11 cards on the table because that's what he did. He filed a very  
12 comprehensive objection. He asserted a right to the  
13 opportunity that the debtor was proposing to take in the 9019  
14 motion. That's what he was doing. He was objecting on the  
15 basis that he claimed his client had a superior right to this  
16 asset.

17 And he didn't -- like I said earlier, Your Honor, I  
18 don't think he would be permitted, I don't think these claims  
19 would fly today if no objection was filed. But the fact that  
20 there was renders, I think, indisputable that there was a  
21 finding on the merits, right. And the only reason that the  
22 Court didn't rule on Mr. Kane's motion, the only reason the  
23 Court didn't rule on it is because Mr. Kane withdrew it.

24 Is that really the way this process is supposed to  
25 work, that one can tell the Court that after a review of the

1 documents, I'm going to withdraw the objection and then file a  
2 claim for damages three months later with a different client,  
3 with a different control person, with a different lawyer?

4 That's okay under doctrine of res judicata? I don't think so.

5           They had a full and fair opportunity. The fact that  
6 this was somehow -- you know, they're denigrating the fact that  
7 this was a 9019 motion. There's not supposed to be a mini-  
8 trial. Your Honor had discretion as to what to do. Every  
9 court in every bench trial has discretion as to what to do and  
10 whether or not to overrule objections and whether or not to  
11 sustain [sic] objections. That's what judges to.

12           And there's nothing offensive about the fact that it  
13 happened in the context of a 9019 motion. They don't get to  
14 sit on their hands and wait to fight another day. If they  
15 believed that the debtor was exposing itself to liability, and  
16 that's what they actually say in the opposition, that's what I  
17 actually think they say in the complaint, accept it as true,  
18 they believe that the debtor created liability for itself by  
19 rendering -- by entering into this transaction.

20           Shouldn't they have raised their hand and said you  
21 can't do this deal, right? And the only response to that --  
22 they have to that is they had no idea about value. Paragraph  
23 127, Your Honor, Mr. Dondero, the architect of this complaint,  
24 as was proven on June 8th, knew very well about value. And it  
25 doesn't matter that it was only MGM. Your Honor commented on

1 that at the June 8th hearing in a different context. But  
2 everybody knows, right, it is. He sits on the board of MGM.

3 And I'm sorry if I called him a tippee instead of a  
4 tipper. But if this complaint goes forward, we'll dig into  
5 that real deep. But there's no reason it ought to, Your Honor.  
6 This case ought to be dismissed on res judicata grounds. It  
7 should be dismissed on judicial estoppel grounds. And it  
8 should be dismissed for all the reasons that I said in my  
9 argument in my brief.

10 But I do just want to close with one point, and that  
11 is to read from a case called Goldstein, which I think I  
12 alluded to earlier on this issue of whether there's a fiduciary  
13 duty that's owed by an advisor to an investor and a fund:

14 "At best, it is counterintuitive to characterize the  
15 investors in a hedge fund as the clients of the  
16 advisors. The advisor owes fiduciary duties only to  
17 the fund, not to the fund's investors."

18 There's a lot of discussion about fiduciary duties,  
19 Your Honor. But to the extent that they have any basis to  
20 defeat the motion to dismiss on res judicata or collateral  
21 estoppel grounds, we hope and we trust and we know the Court  
22 will review the case law vigorously to test some of the  
23 assertions to that.

24 I have nothing further, Your Honor.

25 THE COURT: All right. Well, thank you to all of

1 you.

2 As a reminder, I don't think you need it, but as a  
3 reminder, I am essentially acting as a magistrate for Judge  
4 Boyle in this action. And whichever way I go on whichever  
5 theories, I think she would expect a thorough write-up. It  
6 would, of course, be in the form of a report and recommendation  
7 for her to either adopt or not if I dispose of some or all of  
8 the counts in the lawsuit.

9 Even to the extent I deny dismissal, even though the  
10 rule typically does not require a court to make detailed  
11 findings and conclusions in connection with a denial of a  
12 motion to dismiss, again, since I'm sitting as a magistrate, I  
13 think Judge Boyle would expect some thorough explanations and  
14 reasoning from me.

15 So that's my way of saying I'm taking this under  
16 advisement. I am going to drill down on some of the cases that  
17 have been argued. I think some important issues are raised  
18 here that need some thorough reasoning.

19 So I will do the best to get this out without too  
20 much delay. I think there's probably zero chance, zero chance  
21 I'm going to get it done by the end of the year. We're just  
22 too behind with some of our under-advisements. But I will try  
23 earnestly to get it out fairly soon after the first of the  
24 year. All right?

25 Thank you. You all have a good holiday.



THE CLERK: All rise.

(Proceedings concluded at 12:37 p.m.)

\* \* \* \* \*

**C E R T I F I C A T I O N**

We, DIPTI PATEL, KAREN WATSON, CRYSTAL THOMAS, AND  
PATTIE MITCHELL, court approved transcribers, certify that the  
foregoing is a correct transcript from the official electronic  
sound recording of the proceedings in the above-entitled  
matter, and to the best of my ability.

/s/ Dipti Patel

DIPTI PATEL, CET-997

/s/ Karen Watson

KAREN WATSON, CET-1039

/s/ Crystal Thomas

CRYSTAL THOMAS, CET-

/s/ Pattie Mitchell

PATTIE MITCHELL

LIBERTY TRANSCRIPTS

DATE: November 23, 2021



CLERK, U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS

**ENTERED**

THE DATE OF ENTRY IS ON  
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed September 30, 2022

  
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	CASE NO. 19-34054-SGJ-11
L.P.,	§	(CHAPTER 11)
REORGANIZED DEBTOR.	§	
	§	
CHARITABLE DAF FUND, L.P.,	§	
	§	
PLAINTIFF	§	
	§	
VS.	§	ADVERSARY NO. 22-03052
	§	
HIGHLAND CAPITAL MANAGEMENT,	§	
L.P.,	§	
	§	
DEFENDANT	§	

**MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S AMENDED  
MOTION TO DISMISS ADVERSARY PROCEEDING**

**[DE ## 19, 20, 21, & 32]<sup>1</sup>**

<sup>1</sup> "DE # \_\_\_\_" as used herein refers to the Docket Number at which a pleading appears in the docket maintained by the Bankruptcy Clerk in Adv. Proc. No. 22-03052. Here, DE ## 19, 20 & 21 refer to the Amended Motion to Dismiss, the Brief in Support, and the Appendix in Support filed by the Defendant (the "Original Appendix").

004651

## I. INTRODUCTION

The above-referenced action (“Action”) was originally commenced in the United States District Court for the Northern District of Texas (“District Court”) and was thereafter referred to the bankruptcy court (“Bankruptcy Court”).<sup>2</sup>

In the Action, a Plaintiff seeks damages and other relief from a former Chapter 11 debtor, *pertaining to business conduct undertaken by the debtor, during the course of its Chapter 11 bankruptcy case (“Bankruptcy Case”)—conduct that allegedly harmed the Plaintiff*. The Action was filed after confirmation of the Debtor’s plan, but before the effective date of the plan occurred.

The former debtor-in-possession (now a reorganized debtor) moves for dismissal of the Action, arguing primarily that the filing of the Action in District Court *was an improper means for pursuing a post-petition administrative claim against a chapter 11 debtor*. There was a well-defined process for pursuing administrative expense claims in the Bankruptcy Case—of which the Plaintiff received ample notice—and the Plaintiff ignored that process, choosing instead to embark on post-confirmation litigation in the District Court. The former debtor-in-possession also argues

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Additionally, DE # 32 refers to the Defendant’s Amended Appendix in Support of Amended Motion to Dismiss, that merely added two more exhibits to Defendant’s Original Appendix—new Exhs. 21 & 22. *See also* DE # 30 (the Response of the Plaintiff) and DE # 31 (the Reply of the Defendant). Notably, at the oral argument on the Amended Motion to Dismiss, the court ruled that only Exhs. 1-13, 17, 21, and 22 would be considered by the court. All of these exhibits, *except Exh. 17*, were items on the Bankruptcy Court’s docket of which this court may take judicial notice in the context of a Rule 12(b) motion to dismiss. Although a court generally limits its inquiry on a Rule 12(b) motion to dismiss to a plaintiff’s complaint or any documents attached to the complaint, a court may also take judicial notice of matters that are part of the public record when considering a motion to dismiss. *See, e.g., T.L. Dallas (Special Risks), Ltd. v. Elton Porter Marine Ins.*, No. 4:07-cv-0419, 2008 WL 7627807, at \*2 (S.D. Tex. 2008); *Cade v. Henderson*, No. CIV A 01-943, 2001 WL 1012251, at \*2 (E.D. La. Aug. 31, 2001). *As to Exh. 17*, it was a short Declaration of Defendant’s Chief Executive Officer (“CEO”), James Seery, dealing solely with the Rule 12(b)(1) standing (i.e., lack of subject matter jurisdiction) issue, and there was no objection to Exh. 17 being considered by the court. *See* DE # 41, Transcript of oral argument on the Amended Motion to Dismiss (“8/3/22 Transcript”), at 3:22–5:17.

<sup>2</sup> The referral occurred by virtue of an order entered by Judge David C. Godbey on May 19, 2022, in Civil Action # 3:21-cv-01710-N. *See* DE # 32, Ex. 13, Appx. 477-79.

that—in addition to Plaintiff’s procedural problems—that Plaintiff lacks standing to pursue its claims.

*A. The Parties*

The movant is the Defendant, Highland Capital Management, L.P., now a reorganized debtor (“Highland” or “Reorganized Debtor”). Highland is the sole defendant. The allegedly actionable conduct of Highland occurred in August 2020 (mid-way through its Chapter 11 case). The Bankruptcy Court entered an order confirming Highland’s Chapter 11 plan, on February 22, 2021. Highland’s plan went effective on August 11, 2021. The Action was filed on July 22, 2021, some seven months after entry of the Bankruptcy Court’s confirmation order but just before the effective date.

The respondent, the Plaintiff, is an entity known as Charitable DAF Fund, L.P. (“Plaintiff” or “Plaintiff/DAF”).<sup>3</sup> Plaintiff is a limited partnership hedge fund, organized in the Cayman Islands, that purports to have charitable purposes (i.e., it is designated as a “donor advised fund”), and was originally seeded with funds from Highland.<sup>4</sup> Plaintiff purports to now act through an

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<sup>3</sup> Notably, this is Plaintiff/DAF’s *second* time to sue Highland, post-confirmation, regarding Highland’s alleged post-petition mismanagement or misconduct during its Chapter 11 case. *See* Adv. Proc. # 21-3067 styled *Charitable DAF Fund, L.P. et al. v. Highland Capital Management, L.P., et al.* (Bankr. N.D. Tex.) (hereinafter, the “First DAF Post-Confirmation Lawsuit Against Highland”). The First DAF Post-Confirmation Lawsuit against Highland was also filed in the United States District Court (Judge Jane Boyle) and then was referred by Judge Boyle to the Bankruptcy Court. That lawsuit challenged the legality of Highland’s conduct in entering into a compromise and settlement agreement during the Bankruptcy Case (with Bankruptcy Court approval) with an entity known as HarbourVest. The Bankruptcy Court dismissed the First DAF Post-Confirmation Lawsuit Against Highland on March 11, 2022 (based on estoppel grounds and declining to reach other grounds possibly warranting dismissal). Finally, this court notes that an entity known as Dugaboy Investment Trust—a family trust of which Highland’s former CEO, James Dondero, and/or his family members are beneficiaries—earlier, on June 23, 2021, filed a District Court action based on the very same allegations that are asserted in this present Action but later voluntarily dismissed such action. DE # 32, Exh. 22, Appx. 781. *See also* 8/3/22 Transcript at 10:13.

<sup>4</sup> *See* DE # 99 entered in the First DAF Post-Confirmation Lawsuit Against Highland, Adv. Proc. # 21-3067, at p.2. As referenced earlier, although a court generally limits its inquiry on a motion to dismiss to the plaintiff’s complaint or any documents attached to the complaint, a court may also take judicial notice of matters that are part of the public record when considering a motion to dismiss. *See* authorities mentioned in footnote 1, *supra*.

individual named Mark Patrick<sup>5</sup>—a former Highland employee who now works for entities controlled by or associated with James Dondero, Highland’s founder and former CEO.

*B. The Allegedly Actionable Conduct.*

Plaintiff represents in its Complaint that it was an investor in a non-debtor entity known as “Multi Strat.” Multi Strat was controlled by Highland—in that Highland was Multi Strat’s investment manager and ultimate majority equity owner.<sup>6</sup> In its Complaint, Plaintiff alleges that Highland, during its Bankruptcy Case, breached contractual and extra-contractual duties to Plaintiff, as an alleged investor in “Multi Strat”—supposedly causing Plaintiff harm. The pith of the Complaint deals with Multi Strat’s previous ownership of a pool of “viaticals.” Viaticals are life insurance policies, insuring the lives of various random individuals, that have been purchased, with the purchaser taking over the payment of premiums on such policies, such that when the individual dies, the life insurance proceeds are paid to the purchaser/owner of the policies (in this case, Multistrat). Distilled to its essence, Plaintiff’s argument is that Highland—acting as Multi Strat’s investment manager—caused the sale of Multi Strat’s pool of viaticals, during the Chapter 11 case (in August 2020), pursuant to a flawed process, at a price that Plaintiff believes was too low, and subject to other improprieties. To be clear, the sale was not subject to a Section 363 sale motion or court order, since Multi Strat’s assets (i.e., the viaticals) were not property of the estate.

The Complaint must be dismissed, pursuant to Rules 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure (the “FRCP”), made applicable to this Action by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure (the “FRBP”), for at least two reasons. First, the causes

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<sup>5</sup> Until at least mid-January 2021, Grant Scott, James Dondero’s life-long friend and college roommate, was the sole director of Plaintiff/DAF. See DE # 99, entered in the First DAF Post-Confirmation Lawsuit Against Highland, Adv. Proc. # 21-3067, at p. 3. Mark Patrick was installed as the new control person at some point thereafter in 2021. DE # 32, Exh. 22, Appx. 790.

<sup>6</sup> It is undisputed that Highland was both the investment manager of and majority investor in Multi Strat.

of action asserted in the Complaint—that Highland breached its contractual and extra-contractual duties to Plaintiff *during* the Chapter 11 case—would, if meritorious, have been “administrative expense claims” and, under the terms of the Plan, were required to be filed *with the Bankruptcy Court* and served on Highland no later than September 25, 2021. Despite these Plan requirements—of which Plaintiff received notice—Plaintiff asserted its claims through this Action in the District Court. That decision must be deemed fatal, and Plaintiff’s claims are now time-barred. Second, Plaintiff has now acknowledged in its response to Highland’s Amended Motion to Dismiss that it is not an investor in Multi Strat. Rather, its subsidiary, an entity known as “CLO Holdco” is (“CLO Holdco” is apparently a 4.06% equity owner of Multi Strat). Regardless of Plaintiff’s reasons for filing the Complaint in its own name, rather than in the name of its subsidiary CLO Holdco (and this court can only speculate),<sup>7</sup> the result is the same. Plaintiff itself lacks standing to assert the claims in the Complaint, for the reasons further described herein, and this Court accordingly lacks jurisdiction to adjudicate the claims asserted in the Complaint. Moreover, allowing substitution of CLO Holdco as a plaintiff at this point in time (if a motion pursuant to Rules 15 and 17 of the FRCP were to be made) would be futile, since the real problem here is the failure to follow the Plan and Bankruptcy Code’s required procedures for pursuing an administrative expense claim. Accordingly, the Complaint must be dismissed.

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<sup>7</sup> The court notes that CLO Holdco was *very active* in the Highland Bankruptcy Case, including objecting to the Plan. See DE ## 1675 and 1797 in the main Highland Bankruptcy Case. Its 100% parent, Plaintiff/DAF, on the contrary, was not nominally—although Plaintiff/DAF, as 100% parent to CLO Holdco, would have necessarily been giving directions to CLO Holdco during the Bankruptcy Case. The court cannot help but speculate that Plaintiff was trying to avert estoppel arguments that might have been made if CLO Holdco had filed this Action—given its active litigation of the Plan. In any event, as described herein, this Action fails for other reasons more fundamental than estoppel.

## II. UNDISPUTED FACTS

### A. *Relevant Dates and Deadlines in the Highland Bankruptcy Case*

On October 16, 2019 (the “Petition Date”), Highland commenced a voluntary petition under chapter 11 of the Bankruptcy Code.

On February 22, 2021, after months of contentiousness and various sessions of mediation with professional mediators—which successfully led to resolution of certain large creditor claims—the Bankruptcy Court entered an Order (i) Confirming the Fifth Amended Plan of Reorganization (as Modified) and (ii) Granting Related Relief (the “Confirmation Order”),<sup>8</sup> which confirmed the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P (as Modified) (the “Plan”).<sup>9</sup>

Notably, the Plan contained customary language incorporating section 1141(d)(1)(A) of the Bankruptcy Code and releasing the Debtor from pre-confirmation liabilities of any kind:

Except as otherwise expressly provided by this Plan or the Confirmation Order, upon the Effective Date, the Debtor and its Estate will be deemed discharged and released under and to the fullest extent provided under section 1141(d)(1)(A) and other applicable provisions of the Bankruptcy Code from any and all Claims and Equity Interests of any kind or nature whatsoever, including, but not limited to, demands and liabilities *that arose before the Confirmation Date*, and all debts of the kind specified in section 502(g), 502(h), or 502(i) of the Bankruptcy Code.<sup>10</sup>

Section 1141(d)(1)(A), in turn, provides that the confirmation of a plan “discharges the debtor from any debt that arose before the date of such confirmation.” 11 U.S.C. § 1141(d)(1)(A). To be clear, this did not leave parties without a remedy to assert possible post-petition, pre-confirmation claims. In that regard, the Plan contained customary definitions and other provisions

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<sup>8</sup> DE # 32, Exh. 3, Appx. 19-180.

<sup>9</sup> *Id.*, Exh. 4, Appx. 181-247.

<sup>10</sup> *Id.*, Exh. 4, Appx. 235 (emphasis added).

regarding the filing and adjudication of “administrative expense claims.” These provisions, summarized below, are key to the disputes in this Action.

First, as is typical for a Chapter 11 plan, there was a “Defined Term” for “Administrative Expense Claim” as follows:

“Administrative Expense Claim” means any Claim for costs and expenses of administration of the Chapter 11 Case that is Allowed pursuant to sections 503(b), 507(a)(2), 507(b) or 1114(2) of the Bankruptcy Code, including, without limitation, (a) the actual and necessary costs and expenses incurred after the Petition Date and through the Effective Date of preserving the Estate and operating the business of the Debtor . . . and that have not already been paid by the Debtor during the Chapter 11 Case . . . .<sup>11</sup>

Second, the Plan further provided that:

If an Administrative Expense Claim . . . is not paid by the Debtor in the ordinary course, the Holder of such Administrative Expense Claim must ***File***, on or before the applicable Administrative Expense Claims Bar Date, ***and serve on the Debtor or Reorganized Debtor***, as applicable . . . an application for allowance and payment of such Administrative Expense Claim.<sup>12</sup>

There was a defined term for “File” in the Plan as follows:

“File” or “Filed” or “Filing” means file, filed, or filing with the Bankruptcy Court or its authorized designee in the Chapter 11 Case.<sup>13</sup>

Finally, there was a defined term for Administrative Expense Bar Date as follows:

“Administrative Expense Claims Bar Date” means, with respect to any Administrative Expense Claim (other than a Professional Fee Claim) becoming due on or prior to the Effective Date, 5:00 p.m. (prevailing Central Time) on such date that is ***forty-five days after the Effective Date***.<sup>14</sup>

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<sup>11</sup> *Id.*, Appx. 189.

<sup>12</sup> *Id.*, Appx. 204 (emphasis added).

<sup>13</sup> *Id.*, Appx. 196 (note that the reference to the “authorized designee” for the Bankruptcy Court in the Chapter 11 Case would have been a reference to Kurtzman Carson Consultants LLC (“KCC”), the claims and noticing agent in the above-captioned case, which, among other things, maintained the proof of claim register in the case for ***prepetition*** claims).

<sup>14</sup> *Id.*, Appx. 189 (emphasis added).



On August 11, 2021, the Plan became effective. On August 11, 2021, Highland filed the Notice of Occurrence of Effective Date of Confirmed Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (the “Notice of Effective Date”),<sup>15</sup> clearly disclosing that the “Effective Date” (as defined in the Plan) had occurred on August 11, 2021.

Consistent with the Plan, the Notice of Effective Date disclosed in bold, capitalized letters, that all “administrative expense claims” were required to be filed no later than 45 days after the Effective Date (i.e., September 25, 2021):

**PLEASE TAKE FURTHER NOTICE** that, except with respect to Administrative Expense Claims that are Professional Fee Claims or as otherwise set forth in the Plan, requests for payment of an Administrative Expense Claim must be Filed with the Bankruptcy Court no later than forty-five (45) days after the Effective Date (the “Administrative Expense Claims Bar Date”). **HOLDERS OF ADMINISTRATIVE EXPENSE CLAIMS THAT ARE REQUIRED TO FILE AND SERVE A REQUEST FOR PAYMENT OF SUCH ADMINISTRATIVE EXPENSE CLAIMS BY THE ADMINISTRATIVE EXPENSE CLAIMS BAR DATE THAT DO NOT FILE AND SERVE SUCH A REQUEST BY THE ADMINISTRATIVE EXPENSE CLAIMS BAR DATE SHALL BE FOREVER BARRED, ESTOPPED, AND ENJOINED FROM ASSERTING SUCH ADMINISTRATIVE EXPENSE CLAIMS AGAINST THE DEBTOR OR THE REORGANIZED DEBTOR.**<sup>16</sup>

Highland served the Notice of Effective Date via at least First-Class Mail on Plaintiff/DAF.<sup>17</sup> It is undisputed that Plaintiff/DAF did not *file* an administrative expense claim with the *Bankruptcy Court*, nor did it *serve* one on the Reorganized Debtor by the bar date.

However, on July 22, 2021, seven months after entry of the Confirmation Order (and prior to the Administrative Expense Claim Bar Date), Plaintiff commenced this Action against Highland

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<sup>15</sup> *Id.*, Exh. 7, Appx. 269-73.

<sup>16</sup> *Id.*, Appx. 271 (emphasis in original).

<sup>17</sup> *Id.*, Exh. 8, Appx. 310. The court also notes that CLO Holdco’s counsel received electronic Notice of the Effective Date, *id.* at Appx. 278, as well as notice by First-Class Mail, *id.*, at Appx. 282, and CLO Holdco itself received Notice of the Effective Date by First-Class Mail, *id.* at Appx. 312-313 at numerous addresses. The court takes judicial notice that the Plan itself was also served on CLO Holdco and its counsel. *See* DE #1630, in the main Highland Bankruptcy Case, at Exh. S, p.25 of 139, and at Exh. V, p. 1 of 3.

by filing an Original Complaint (the “Complaint”) in the District Court.<sup>18</sup> It is undisputed that Plaintiff/DAF also never served the Complaint on Highland.<sup>19</sup>

The Complaint alleged that Highland, under the direction of its new, independent CEO, James P. Seery, Jr.—appointed pursuant to a corporate governance agreement between Highland and the Official Committee of Unsecured Creditors (and approved by the Bankruptcy Court)—violated the contractual and extra-contractual duties that Highland owed to Plaintiff/DAF as an alleged investor in the entity known as Multi Strat and that Plaintiff/DAF was harmed thereby.<sup>20</sup> As noted in the Introduction herein, Multi Strat was a vehicle that purchased and owned a pool of viaticals—that is, life insurance policies keyed to the lives of various individuals. Multi Strat paid the premiums on the policies, and when an insured person died, the life insurance money would be paid to the owner of the policy—in this case, Multi Strat.

Highland’s alleged misconduct occurred during the spring and summer of 2020, i.e., after the Petition Date while Highland was a debtor-in-possession.<sup>21</sup> The contracts allegedly breached were assumed by Highland pursuant to the Plan.<sup>22</sup>

*B. The Substance of the Complaint; More About “Multi Strat”*

The Complaint sets forth three causes of action premised on conduct in which Highland allegedly engaged post-petition: (a) First Cause of Action—Highland’s alleged violation of the Investment Advisers Act of 1940;<sup>23</sup> (b) Second Cause of Action—Highland’s alleged breach of

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<sup>18</sup>*Id.*, Exh. 5, Appx. 248-59.

<sup>19</sup> See 8/3/22 Transcript, at 28:2-11.

<sup>20</sup>DE # 32, Exh. 5, Appx. 252-58.

<sup>21</sup>*Id.*, Appx. 251.

<sup>22</sup>*Id.*, Exh. 4, Appx. 224-25; Exh. 6, Appx. 262, 264.

<sup>23</sup> Although no statutory cite is given, the Plaintiff apparently refers to the Investment Advisers Act of 1940, codified at 15 U.S.C. § 80b-1 through 80b-21, which is the primary source of regulation of investment advisers and is administered by the U.S. Securities and Exchange Commission. The court notes that the United States Supreme Court has held in *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) that there is not a private right of action for damages under the Investment Advisers Act. Specifically, an investor may seek to **void an investment adviser contract** (i.e., essentially allowing a suit for rescission or for an injunction against continued

fiduciary duty;<sup>24</sup> and (c) Third Cause of Action—Highland’s alleged breach of contract.<sup>25</sup> The various conduct of Highland is described as: (1) selling the viatical pool of Multi Strat at a distressed price (i.e., \$35 million) when it was not in distress and there was allegedly no need for Multi Strat to sell; (2) concealing the information about the transaction from the Plaintiff; (3) failing to advise the Plaintiff of the opportunity to purchase the viatical pool—especially when it knew the Plaintiff had an interest in the pool and had the means of purchasing it for more cash than \$35 million; (4) allegedly concealing the purpose behind the sale of the viatical pool and conflicts of interest; (5) allegedly causing the viatical pool to be sold in a manner that violated the rights of the Plaintiff as an investor in Multi Strat (e.g., by failing to conduct an auction, obtaining competitive bids and taking the pool to market); and (6) utilizing the sale proceeds for its own ends—namely, to enrich itself.

The entity at the heart of the Complaint—Multi Strat—is what is known in the investment community as a pooled investment fund structured as a “mini master.” It actually consists of Highland Multi Strategy Credit Fund, L.P., a Delaware limited partnership (the “Master Fund”), and Highland Multi Strategy Credit Fund, Ltd., a Cayman Island exempted company (the “Feeder Fund”). The Master Fund and the Feeder Fund are collectively referred to as “Multi Strat.” Highland Multi Strategy Credit Fund GP, L.P., itself a Delaware limited partnership, is the general

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operation of the contract, and for restitution), but not seek actual monetary damages. That being said, it appears that the relief sought by Plaintiff for this cause of action is as follows: “Plaintiff seeks to declare the sale of the viaticals void because they were accomplished in violation of the Advisers Act” and “Plaintiff further seeks to declare the agreement(s) between Highland and Multistrat void because they were continued in violation of the Advisers Act.” Complaint, *id.* at Exh. 5, Appx. 254.

<sup>24</sup> Here, the Plaintiff appears to invoke both the Investment Advisers Act as well as Texas law—clearly seeking monetary damages including punitive damages.

<sup>25</sup> *Id.*, Exh. 5, Appx. 252-58. Here, the Plaintiff invokes the Third Amended and Restated Investment Management Agreement, effective November 1, 2013 (the “IMA”) between Highland and Multi Strat.

partner of Multi Strat, which is wholly owned by Highland Multi Strategy Credit GP, LLC, which is, in turn, wholly owned by Highland.<sup>26</sup>

The equity ownership interests of the limited partners in Multi Strat are somewhat complex but, put simply, on a consolidated basis, Highland owns 58.7% of the limited partnership interests in Multi Strat and the entity known as CLO Holdco, Ltd. (“CLO Holdco”) owns 4.06% of the limited partnership interests. *Notably, CLO Holdco is a subsidiary of Plaintiff/DAF, but, as noted earlier, it is undisputed that Plaintiff/DAF itself is not an investor or equity owner of any sort of Multi Strat.*<sup>27</sup>

Also, notably, the only other owners of Multi Strat are: The Dugaboy Investment Trust (1.71%);<sup>28</sup> Highland Capital Management Services, Inc. (35.10%), and Mark Okada (.43%).<sup>29</sup> The Dugaboy interest is notable for the following reason: Dugaboy filed a proof of claim during the Highland Bankruptcy Case that, while vague, appears to have been based on the very same theories espoused by the Plaintiff/DAF in this Action. Specifically, it stated:

The Dugaboy Investment Trust (“Claimant”), an investor in certain funds managed by the Debtor, including Highland Multi-Strategy Credit Fund, L.P. and Highland Multi-Strategy Credit Fund, Ltd., may have claims against the Debtor relating to the post-petition actions or inactions of the fund investment manager in managing these funds pursuant to Debtor’s Fourth Amended and Restated Limited Partnership Agreement and that certain Third Amended and Restated Investment Management Agreement by and between Highland Multi-Strategy Credit Fund, L.P., Highland Multi-Strategy Credit Fund, Ltd., and the Debtor, as amended from time to time. While the potential claims relate to the post-petition actions or inactions of the fund investment manager, Claimant is filing this claim to preserve

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<sup>26</sup> *Id.* at Exh. 17, Appx. 592-93. The Master Fund’s governing document is known as the Fourth Amended and Restated Limited Partnership Agreement of Highland Multi Strategy Credit Fund, L.P., dated November 1, 2014 (the “LPA”). The Feeder Fund’s governing document is known as the Amended and Restated Memorandum and Articles of Association of Highland Multi Strategy Credit Fund, Ltd., as adopted on November 1, 2014 (the “Articles”). Highland’s obligations as investment manager are set forth in a document known as the Third Amended and Restated Investment Management Agreement, by and among Highland Multi Strategy Credit Fund, Ltd., Highland Multi Strategy Credit Fund, L.P., and Highland Capital Management, L.P., dated November 1, 2013 (the “IMA”).

<sup>27</sup> *Id.* at Exh. 17, Appx. 592-93.

<sup>28</sup> It is undisputed that Dugaboy is a family trust of former Highland CEO, James Dondero.

<sup>29</sup> *Id.* at Exh. 17, Appx. 592-93.

all potential rights, claims, and causes of action it may have against the Debtor under these prepetition agreements relating to the investment manager's actions or inactions in managing these funds.<sup>30</sup>

The Dugaboy proof of claim was signed and submitted by an individual named Grant Scott, the then-Trustee of Dugaboy. Grant Scott was also the then-Trustee of CLO Holdco, the 100% subsidiary of Plaintiff/DAF. This proof of claim was later withdrawn.

Dugaboy also filed a District Court lawsuit against Highland (post-confirmation and pre-Effective Date, on June 23, 2021)<sup>31</sup> raising these very same issues, which it later dismissed.

### III. LEGAL ANALYSIS

#### A. *Jurisdiction and Legal Standards*

Bankruptcy subject matter jurisdiction exists with regard to this Action, pursuant to 28 U.S.C. § 1334(b). The Action presents “arising in” or “arising under” core matters, pursuant to 28 U.S.C. § 157(b)(2)(A) and (B)—as it involves claims that were asserted against a Chapter 11 Debtor (before the effective date of its plan) and the application of sections 503 and 507 of the Bankruptcy Code. Moreover, the Action requires interpretation of the now-effective Plan of the Reorganized Debtor and application of section 1141(d)(1) of the Bankruptcy Code. Therefore, the Bankruptcy Court may enter final orders in this matter. Moreover, the District Court has referred this Action to the Bankruptcy Court.

The Reorganized Debtor's Amended Motion to Dismiss argues grounds for dismissal, pursuant to FRCP 12(b)(1) (i.e., lack of subject matter jurisdiction—due to lack of standing of the Plaintiff) and FRCP 12(b)(6) (i.e., failure to state a claim upon which relief may be granted).

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<sup>30</sup> *Id.* at Exh. 1, Appx. 6.

<sup>31</sup> *Id.* at Exh. 2, Appx. 8-18.

With regard to the Rule 12(b)(1) argument, the applicable legal standards are set forth in detail in part III.E. of this Opinion. With regard to Rule 12(b)(6), to survive a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). *See also Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). Dismissal is proper under Rule 12(b)(6) when, taking the facts alleged in the complaint as true, it appears that the plaintiff “cannot prove any set of facts that would entitle it to the relief it seeks.” *C.C. Port, Ltd. v. Davis-Penn Mortg. Co.*, 61 F.3d 288, 289 (5th Cir. 1995). As set forth below, here, more than anything else, Plaintiff/DAF’s problem is that its claims are barred for failure to proceed according to the Plan requirements and because of section 1141(d)(1)(A) of the Bankruptcy Code. As earlier noted, the court may take judicial notice of matters of public record when considering a motion to dismiss for failure to state a claim. *See, e.g., T.L. Dallas (Special Risks), Ltd. v. Elton Porter Marine Ins.*, No. 4:07–cv–0419, 2008 WL 7627807, at \*2 (S.D. Tex. 2008); *Cade v. Henderson*, No. CIV A 01-943, 2001 WL 1012251, at \*2 (E.D. La. Aug. 31, 2001).

*B. Plaintiff’s Claims Asserted in the Action, if Valid, Would Constitute “Administrative Expense Claims”*

Starting with the basics, an “Administrative Expense Claim” is not merely a concept defined in the Debtor’s Plan. It is a significant concept in the Bankruptcy Code. Section 507(a)(2) of the Bankruptcy Code establishes that administrative expenses incurred in bankruptcy are to be given priority in distribution such that they are generally paid in full before other unsecured non-priority claims. *See* 11 U.S.C. § 507(a)(2). These administrative expenses include “the actual, necessary costs and expenses of preserving the estate ....” 11 U.S.C. § 503(b)(1)(A). To qualify as an “‘actual and necessary cost’ under section 503(b)(1)(A), a claim against the estate must have

arisen post-petition and as a result of actions taken by the trustee [or debtor-in-possession] that benefited the estate.” See *Nabors Offshore Corp. v. Whistler Energy II, L.L.C. (In re Whistler Energy II, L.L.C.)*, 931 F.3d 432, 441 (5th Cir. 2019) (citing *Total Minatome Corp. v. Jack/Wade Drilling, Inc. (In re Jack/Wade Drilling, Inc.)*, 258 F.3d 385, 387 (5th Cir. 2001)). Notwithstanding the “benefited the estate” concept that has been articulated in case law, an exception was created by the United States Supreme Court many years ago (in the context of a “Chapter XI arrangement” case under the former Bankruptcy Act of 1898), in a situation in which damages were inflicted on innocent third parties through a receiver's (equivalent of a Chapter 11 trustee or debtor-in-possession today) operation of the debtor's estate. See *Reading Co. v. Brown*, 391 U.S. 471, 478-79 (1968).

In *Reading*, a building that was being operated by the bankruptcy receiver in a reorganization case was destroyed by a fire, and the fire spread to adjoining premises, destroying real and personal property of claimant, Reading. Reading argued that the fire was caused by the negligence of the receiver and one of his workmen, in the course of operating the debtor's estate during a bankruptcy reorganization. See *id.* at 473–74. The Supreme Court—in grappling with what type of a claim Reading might have—held that it would be unfair to force the fire victim to share equally with the existing creditors and, thus, granted administrative priority to that claimant. See *id.* at 478 (framing the question as “whether the fire claimants should be subordinated to, should share equally with, or should collect ahead of those creditors for whose benefit the continued operation of the business ... was allowed”).

The “*Reading* exception,” as it has become known, has withstood the test of time and has been routinely applied after the enactment of the modern Bankruptcy Code. See, e.g., *Jack/Wade Drilling*, 258 F.3d at 388 (“The Reading exception has survived Congressional amendments to the



bankruptcy code and been recognized and applied by nearly every Court of Appeals in the nation.”); *Texas v. Lowe (In re H.L.S. Energy Co.)*, 151 F.3d 434, 437 (5th Cir. 1998) (same); *In re Al Copeland Enters., Inc.*, 991 F.2d 233, 238-39 (5th Cir. 1993) (same). The *Reading* case has been interpreted broadly to include not just torts, but other negligent or intentional acts committed by a debtor-in-possession as giving rise to administrative expense claims. *See Al Copeland*, 991 F.2d at 239 (“[T]hose injured during ... administration of an estate are entitled to an administrative priority [claim] regardless of whether their injury was caused by a tort or other wrongdoing.”); *In re Charlesbank Laundry, Inc.*, 755 F.2d 200, 202 (1st Cir. 1985) (“If fairness dictates that a tort claim based on negligence should be paid ahead of pre-reorganization claims, then, a fortiori, an intentional action which violates the law and damages others should be so treated”), *accord* 4 COLLIER’S ON BANKRUPTCY ¶ 503.06[3][c][i] (“Courts have found *Reading* directly applicable to victims of postpetition torts committed by a debtor in possession or trustee. Courts have also applied the doctrine to a variety of other postpetition claims”) (citing cases).

Accordingly, based on the above authority, the claims of Plaintiff, if meritorious, would fall into the category of administrative expense claims. Plaintiff specifically alleges that it was injured by Highland causing the sale of Multi Strat’s assets during the middle of 2020—after the Petition Date, before the Effective Date, and while Highland was a debtor-in-possession—in violation of Highland’s alleged contractual and extra-contractual duties owed to Plaintiff. Plaintiff’s claims, therefore, would constitute “administrative expense claims” against Highland. *Whistler Energy*, 931 F.3d at 443 (discussing circumstances when a party might be entitled to an administrative expense claim, regardless of whether there is an assumed or rejected prepetition contract, and even when “benefit to the estate” may be less than “readily calculable”; noting



sometimes such a claim might simply result as a cost incidental to a debtor's business operations) (citing *Reading*, 391 U.S. 471).

C. *Requests for Allowance of "Administrative Expense Claims" Were Required to be Filed in the Bankruptcy Court by September 25, 2021*

As set forth earlier herein, Article II of the Plan dictated the procedures for the filing and allowance of "administrative expense claims." Pursuant to Article II of the Plan, parties seeking "administrative expense claims" were required to (i) file those claims with the bankruptcy court specifically (not the District Court); and (ii) serve those claims on Highland no later than the Administrative Expense Claim Bar Date (i.e., September 25, 2021).<sup>32</sup> The Plan and Notice of Effective Date make clear that any administrative expense claim not filed with the Bankruptcy Court by the Administrative Expense Claim Bar Date would be time-barred. Section 1141(a) provides that the provisions of a confirmed plan bind the debtor and any creditor. *Eubanks v. Fed. Deposit Ins. Corp.*, 977 F.2d 166, 170–71 (5th Cir. 1992).<sup>33</sup>

This court noted in the case of *In re Taco Bueno Rests., Inc.*, 606 B.R. 289, 302-303 (Bankr. N.D. Tex. 2019), in addressing the importance of the concept of "timeliness" with regard to administrative expense claims, that debtors and reorganized debtors have a keen interest in obtaining finality sooner rather than later with regard to administrative expense claims. The reason debtors have an interest in such finality derives from the special treatment afforded to administrative expense claims. An administrative expense claimant is generally entitled to cash in full on the effective date of a plan (or as soon as the claim is allowed thereafter by the bankruptcy

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<sup>32</sup> See Exh. 4, Appx. 189, 196, 203-04.

<sup>33</sup> See also *Hall Fin. Group, Inc., v. DP Partners, L.P.*, 106 F.3d 667, 672, n.19 (5th Cir. 1997) (bankruptcy judges have, for some time, been accorded discretion in setting administrative-claim bar-dates) (citing 3 Collier on Bankruptcy ¶ 503.1, at 503–4 n. 2c (Lawrence P. King ed., 15th ed. 1994) (noting that the Bankruptcy Reform Act of 1994 sets no time limit for filing administrative claims, and further noting that because nothing in the Bankruptcy Rules or Code sets deadlines for filing administrative claims, bankruptcy judges "may set such deadlines on a case by case basis").

court). It is a very important event in the bankruptcy case for a reorganized debtor to have a deadline for administrative expense claims because administrative claims can pose significant feasibility issues for plans. The reorganized debtor needs to be able to ascertain an amount such entities must have in cash due to pay administrative expenses.

There is ample case law that stresses the importance of requiring potential administrative expense claimants to follow the mandates of Bankruptcy Code section 503(b) and file a request for allowance with the bankruptcy court. *See Taco Bueno*, 606 B.R. 289 (concluding that utilizing a “Proof of Claim” form—i.e., Official Form 410—to make a request for payment of an administrative expense, is insufficient to satisfy the requirement under Bankruptcy Code section 503(a) to timely file and serve a request for payment of an administrative claim by an administrative claims bar date; requests for administrative claims have different procedures—requiring the filing of an application requesting allowance and payment of an administrative-expense claim on the bankruptcy court's docket).<sup>34</sup> *See also In re Maxus Energy Corp.*, 639 B.R. 51, 64 (Bankr. D. Del. 2022) (claim barred because it was not filed by administrative claim bar date and “a claims bar date ‘operates as a federally created statute of limitations, after which the claimant loses all of [its] rights to bring an action against the debtor’) (citations omitted); *Houbigant, Inc. v. ACB Mercantile (In re Houbigant, Inc.)*, 190 B.R. 185, 188 (Bankr. S.D.N.Y.

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<sup>34</sup> This court noted in *Taco Bueno* that Congress made the rules and burdens for an administrative expense claim very different from those for a proof of claim. Section 503 governs an administrative expense claim. Under § 503, the burden at the beginning is on the claimant to show reasonableness, necessity, and benefit to the estate. The Bankruptcy Code and the Bankruptcy Rules put a claimant in a completely different posture for an administrative expense claim compared to a proof of claim. Requiring that a § 503 administrative expense claim be asserted in an application, among other things, ensures that the bankruptcy court will have an opportunity to pass judgment on the administrative expense and prevent any unreasonable, unnecessary, and non-beneficial claims from being charged to the estate. Creditors ultimately bear the burden of persuasion and production to establish that their claims are, in fact, an administrative expense. Allowing creditors to satisfy their burden of production by burying an administrative expense in a proof of claim circumvents their statutory burdens and forces the trustee or some other interested party to affirmatively raise this administrative expense as objectionable—directly contradicting § 503(b)'s express requirement that a claimant, in order to have an administrative expense claim allowed, must make a request and give notice to parties in the case and obtain a bankruptcy court hearing. *Taco Bueno*, 606 B.R. at 302.

1995) (stressing the importance of filing claims timely in the bankruptcy court before the bar date, as opposed to in district court litigation).<sup>35</sup>

Here, Plaintiff's alleged causes of action are administrative expense claims and were required to be filed with this Bankruptcy Court by the Administrative Expense Claim Bar Date. Plaintiff knowingly chose not to file an administrative claim. The filing of the Complaint constituted an *improper means to pursue a post-petition claim against a chapter 11 debtor*. To the extent it may have been a defensible strategy at the time the Action was filed (*see discussion* in Part III.E below for more on this thought), it certainly became wholly indefensible after the Plan went effective. The Plaintiff/DAF received notice and had every reason to know, on or after August 11, 2021, that it had one avenue to pursue the claims asserted in the Action—through the mechanism of filing an Administrative Expense Claim in the Bankruptcy Court on or before September 25, 2021. However, it chose not to go that route. As a result, the Complaint must be dismissed.

Plaintiff/DAF makes a confusing argument that “administrative priority claims” are not subject to the Plan because the Plan uses the term “Administrative Expense Claim.”<sup>36</sup> Plaintiff attempts to create confusion where none exists. As noted earlier, the Plan defines “Administrative Expense Claim,” in relevant part, as a:

Claim for costs and expenses of administration of the Chapter 11 Case ... pursuant to sections 503(b), 507(a)(2), 507(b) ... including, without limitation, (a) the actual and necessary costs and expense incurred after the Petition Date and through the Effective Date of preserving the Estate and operating the business of the Debtor  
....<sup>37</sup>

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<sup>35</sup> See also *NL Indus., Inc. v. GHR Energy Corp.*, 940 F.2d 957, 966 (5<sup>th</sup> Cir. 1991) (case involved a post-petition contract between a chapter 11 debtor and an oil field service vendor that went awry and vendor filed a federal district court lawsuit during the case for breach of contract and torts; while the lawsuit went forward in the Federal District Court, the Fifth Circuit opinion contains discussion stressing the need for the vendor to have filed a request for administrative expense claim in the bankruptcy court and giving that as a reason for not allowing the vendor to amend its pleading to assert damages not provided for in the debtor's confirmed plan).

<sup>36</sup> See DE # 30 (Plaintiff's Response), at 3-4.

<sup>37</sup> DE # 21, Exh. 4, Appx. 189.

There is no “distinction” in the Plan between an “administrative priority claim” and an “Administrative Expense Claim.” Both would encompass claims arising from the “actual and necessary costs and expense” of the debtor-in-possession’s post-petition management. Highland’s naming convention did not somehow change the substantive application of the Bankruptcy Code or the nature of an administrative expense/priority claim.

*D. The Unsupportability of Plaintiff/DAF’s Eleventh-Hour Request (Through Their Response to the Motion to Dismiss Their Action) for the Bankruptcy Court to Excuse Their “Technical Non-Compliance” and Deem Complaint to Have Been a Timely Request for Allowance of an Administrative Expense Claim*

Plaintiff/DAF argues that the Bankruptcy Court should excuse its “technical” non-compliance and treat its Complaint as a “request for an order permitting a late claim or treating the filing of this action as a timely Administrative Expense Claim.”<sup>38</sup> While Plaintiff minimizes the significance of its failure to comply with the Plan, Confirmation Order, and standard bankruptcy protocols—by referring to its failure to file a request for allowance of an administrative expense claim in the Bankruptcy Court as “technical” non-compliance—its proposal that the Complaint should be deemed such a “request” is procedurally and legally improper. The relief must be sought by a separate motion and include evidence of “cause” under section 503(a) of the Bankruptcy Code and possibly also “excusable neglect.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 394 (1993).<sup>39</sup> Here, there is no evidence supporting “cause” (or excusable neglect, for that matter), just the following undisputed facts:

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<sup>38</sup> DE # 30 (Plaintiff’s Response), at p.5.

<sup>39</sup> The *Pioneer* case dealt with late-filed proofs of claim, for prepetition claims, not requests for allowance of post-petition administrative expense claims. Thus, it is not entirely clear that it governs here. Perhaps, only section 503(a) “cause” is the standard.

- The Plan was confirmed on February 22, 2021 and included clear disclosures about the Administrative Expense Claim Bar Date.
- At a hearing on June 25, 2021, shortly before the Complaint was filed—in a hearing on a different matter, in which a different post-petition lawsuit filed in the District Court was being discussed (and the Bankruptcy Court expressed concern about it)—Plaintiff’s counsel indicated to the Bankruptcy Court that he was receiving advice from bankruptcy counsel on whether post-petition administrative expense claims, like those asserted in the Complaint, could be filed in courts other than the Bankruptcy Court.<sup>40</sup>
- On July 22, 2021, Plaintiff’s counsel filed (but did not serve) the Complaint—i.e., seven months after the Confirmation Order and two months before the Administrative Expense Claim Bar Date.
- On or about August 11, 2021, Plaintiff/DAF was served with notice of the Administrative Expense Claim Bar Date.
- Plaintiff/DAF did not file an administrative expense claim with this Court by the Administrative Expense Claim Bar Date (i.e., September 25, 2021).
- On November 23, 2021, the Bankruptcy Court told Plaintiff its arguments regarding the Plan injunction—similar to some of the same arguments it is making now—were mistaken. At the same hearing, Highland told Plaintiff/DAF, on the record, it should have filed an administrative expense claim in this court.<sup>41</sup>

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<sup>40</sup> DE # 32, Exh. 21, Appx. 751-53.

<sup>41</sup> DE # 32, Exh. 22, Appx. 777 (lines 17) – Appx. 778 (line 18); Appx. 781 (line 10) – 782 (line 17); Appx. 783 (line 5-14); Appx. 786 (line 17-23).

- Between the November 2021 hearing and the filing of the Motion (more than eight months), Plaintiff/DAF never moved this Court to allow its claim as late filed or took any other action to protect its rights.
- Only after the Complaint was referred to this Court and Highland filed its Amended Motion to Dismiss did Plaintiff ask this Court to consider the Complaint as “a late claim” in the Response.
- Plaintiff has not submitted any evidence of “cause” as required by Section 503(a), nor “excusable neglect” under *Pioneer* (to the extent it is applicable).

To be clear, Plaintiff argues that it should be held to have asserted a timely request for administrative expense claim because (a) its Complaint was filed (but not served) before the Administrative Expense Claim Bar Date; (b) Highland (while not formally served) received “prompt” notice and was not prejudiced; (c) enforcing the Administrative Expense Claims Bar Date would raise concerns regarding Constitutional “due process and taking;” and (d) the “best interests of creditors test” in Section 1129 favors Plaintiff.<sup>42</sup> Plaintiff also blames its failure to comply on the Plan itself, arguing that a Plan injunction therein prevented Plaintiff from fulfilling its obligations. Each argument misses the point.

First, it is irrelevant that the Complaint was filed before the Administrative Expense Claim Bar Date. The Bankruptcy Code,<sup>43</sup> the Plan,<sup>44</sup> and applicable case law require the filing of administrative expense claims—like those asserted in the Complaint—on the bankruptcy court’s docket, not on another court’s, for a claim to be deemed timely filed. *See, e.g., Taco Bueno*, 606 B.R. at 302-03; *Houbigant*, 190 B.R. at 188.14.

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<sup>42</sup> DE # 30 (Plaintiff’s Response), at p. 5.

<sup>43</sup> 11 U.S.C. § 503(a).

<sup>44</sup> DE # 21, Exh. 4, Appx. 125, 203-04.

Moreover, any suggestion that the Complaint is an “informal proof of claim” is rejected. Even assuming this concept might be applicable in the context of requests for allowance of administrative expense claims, an “informal proof of claim” must be filed in the bankruptcy court and the equities must favor the claimant. *In re Opus Mgmt. Grp. Jackson LLC*, 2017 Bankr. LEXIS 555, at \* 29-30 (Bankr. S.D. Miss. Feb. 27, 2017) (“The Court is unaware of any precedent that would allow it to treat the pre-bar date filing in one case as an informal proof of claim in another case.”); *In re Murchison*, 85 B.R. 27, 41 (Bankr. N.D. Tex. 1987) (“Debtor’s knowledge of the claim has never been held sufficient to constitute an informal proof of claim ... These communications cannot constitute a proof of claim because they were not filed with the Court.”).

Additionally, Plaintiff’s argument regarding prejudice is disingenuous. Plaintiff filed the Complaint but decided not to serve it. Plaintiff cannot rely on Highland’s purported diligence in learning of the Complaint to justify its misconduct. The bar date exists to avoid prejudice to Highland, not Plaintiff. Moreover, other creditors in a bankruptcy case are entitled to notice that a party is asserting an administrative expense claim. Allowance of such a claim could greatly impact their ultimate recovery. Creditors (not just the debtor) may want to object and be heard. That’s why section 503(b) of the Bankruptcy Code contemplates “notice and a hearing” in the bankruptcy court when a request is filed.

Additionally, no due process or taking concerns arise if Plaintiff is required to abide by court- and statutorily created deadlines, and Plaintiff cites to nothing to support this position.

Additionally, the “best interests of creditors” test applies to plan confirmation and is irrelevant in this context. Regardless, the test would weigh in Highland’s favor. Creditors want Highland’s assets monetized and proceeds distributed sooner rather than later. Plaintiff’s efforts to

“backdoor” an administrative expense claim by asserting it in another forum delays that process, increases expenses, and directly contradicts the policy behind bar dates.

Finally, Plaintiff’s argument that it was confused by the Plan discharge or injunction language is not credible. The provisions are typical and unambiguous; they prohibited Plaintiff from pursuing claims in the District Court. Numerous other claimants—including some of Mr. Dondero’s other affiliates—complied with the bar date. Plaintiff is not entitled to special treatment because it, and it alone, found the Plan confusing.

*E. The Plaintiff’s Unspoken, But Not-So-Subtle Strategy Play*

Ultimately, the Plaintiff’s filing of the Complaint in the District Court was a strategic move that did not work and now it binds the Plaintiff.

The Plaintiff’s strategy—rather obvious to this Court—was clever, to be sure, but it all hinged on the prospect of the Debtor’s Plan being reversed on appeal, which did not ultimately happen.<sup>45</sup> Specifically, thinking through the Plaintiff’s legal strategy, the court believes the Plaintiff’s legal team likely thought through this as follows. First, there was an automatic stay conundrum. Specifically, filing the Action might have at first seemed risky, because the automatic stay was still in place at the time the Plaintiff filed its Complaint (because it was filed during the post-confirmation but pre-Effective Date time frame).<sup>46</sup> But, the Plaintiff was pursuing *post*-petition claims, so the filing of the Action arguably was not precluded by the automatic stay. 11 U.S.C. § 362(a)(1).<sup>47</sup> However, even with that automatic stay conundrum potentially resolved, the Plan and Confirmation Order became an obvious obstacle. As discussed here *ad nauseum*, the

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<sup>45</sup> The Fifth Circuit affirmed in substantial part the Plan on September 2, 2022, in Action No. 21-10449.

<sup>46</sup> See also DE # 21, Exh. 4, Appx. 167 (Art. IX.G.).

<sup>47</sup> The inapplicability of the automatic stay was not a “given.” The relief sought in the Plaintiff/DAF’s Complaint asked for, among other things, disgorgement of all of Highland’s allegedly ill-gotten gains, and also voiding of certain agreements of Highland. This sounds potentially like exercising or an attempt to exercise control over property of the estate. 11 U.S.C. § 362(a)(3).



Plan required a post-petition claim like this to be filed as a Request for Allowance of Administrative Expense Claim with the Bankruptcy Court and, moreover, the Plan discharge and injunction language precluded an action such as the Plaintiff's from being filed in another court. Plaintiff was no doubt thinking that it had found the perfect "workaround"—file the Action in the District Court *before* the Plan went effective, seek a stay of the Action for a bit,<sup>48</sup> and hope that, during the stay of the Action, the Plan got reversed on appeal (which would moot the Administrative Claim Bar Date and Plan Injunction). In the event of a reversal, the Plaintiff would seek to un-stay the Action and go forward in the District Court hopefully—unless the District Court decided to refer the Action at that point to the Bankruptcy Court (on the basis that it was at least related to the Bankruptcy Case; maybe Plaintiff could successfully fight this).

Here, as the Plaintiff's legal strategy started to unravel, on July 5, 2022, in its Response to the Motion to Dismiss, the Plaintiff asked the Bankruptcy Court for the first time to treat its Complaint as a timely request for allowance of an administrative expense claim (a year after it was filed, and 10 months after the deadline for filing it in the Bankruptcy Court). This is not "cause" as contemplated by Section 503(a). This is nothing more than a belated and unjustified "Plan B" after the Plaintiff's clever workaround did not pan out as hoped. *Houbigant*, 190 B.R. at 187 ("[Claimant] concedes that it failed to [file its claim] to avoid the claims allowance process ... [Claimant] cannot have it both ways. Equity mandates that it be bound by its tactical decisions.").

*F. The Standing Problem.*

Highland has also argued that the Action must be dismissed because Plaintiff lacks both prudential and constitutional standing to assert the claims that it has asserted in the Action.

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<sup>48</sup> DE # 32, Exh. 9, Appx. 451.

As has been extensively set forth herein, the Complaint alleges that Plaintiff/DAF was injured because Highland mismanaged the sale of certain of Multi Strat's assets and, in doing so, breached its contractual and extra-contractual duties to Plaintiff/DAF as an investor in Multi Strat. But Plaintiff/DAF is not a limited partner or investor in Multi Strat (Plaintiff/DAF agrees it is not). Rather, Plaintiff/DAF's 100% subsidiary CLO Holdco is. Therefore, Highland argues Plaintiff/DAF lacks standing to assert the claims in the Complaint. While Plaintiff/DAF arguably could have constitutional standing as the parent of CLO Holdco (a Multi Strat investor), Plaintiff/DAF would have had to plead its relationship to CLO Holdco, that CLO Holdco was injured, and that the injury to CLO Holdco caused injury to Plaintiff/DAF. *See BCC Merch. Solutions, Inc. v. Jet Pay, LLC*, 129 F.Supp.3d 440, 449-50 (N.D. Tex. 2015) (finding plaintiff parent company had constitutional standing when it pled injury it suffered arising from breach of contract to which its subsidiary was a counterparty). Plaintiff/DAF, however, has not done this.

Highland also argues that Plaintiff/DAF lacks prudential standing because it is not the "real party in interest" as required by Rule 17(a) of the FRCP, made applicable by Rule 7017 of the FRBP. Prudential standing is a "fundamental restriction on [federal judicial] authority" and requires "a litigant [to] assert his or her own legal rights... and [not] rest a claim to relief on the legal rights or interests of third parties." *Id.* at 450 (citations omitted). Prudential standing is a separate requirement from constitutional standing, and, if a plaintiff lacks prudential standing, the action must be dismissed regardless of whether the plaintiff has constitutional standing. *Id.* This prudential standing requirement is embodied in Rule 17(a) of the FRCP, which mandates that a claim be brought by the "real party in interest," i.e., the party "with the right to sue under ... the controlling state or federal substantive laws." *Id.* at 450, 453. Here, Plaintiff/DAF is not an investor

in Multi Strat and has no right to assert the actual investors' contractual or other rights under applicable substantive law.<sup>49</sup>

That Plaintiff/DAF is the parent of CLO Holdco, a Multi Strat investor, changes nothing. A parent cannot assert the contractual rights of its subsidiaries or pierce its own corporate veil to do so. *BCC Merch.*, 129 F. Supp. 3d at 460 (“[W]hile BCC may have Article III standing, the Court finds that it lacks prudential standing and is not the real party in interest entitled to enforce the ISO Agreement, which BCC’s subsidiary, BankCard, undisputedly entered into alone.”). For the foregoing reasons, Plaintiff/DAF is not a “real party in interest” as required by Rule 17(a) and lacks prudential standing to assert the claims in the Complaint.

Plaintiff/DAF argues that it should be given leave to amend its Complaint to clarify that it is suing derivatively on behalf of CLO Holdco and/or to substitute in CLO Holdco as party in interest. The Plaintiff/DAF submits that Rule 7017 of the FRBP requires an opportunity to join a

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<sup>49</sup> See *Carroll v. JPMorgan Chase Bank*, 575 Fed. Appx. 260, 260-61 (5th Cir. 2014) (finding plaintiff lacked standing and was not the “real party in interest” when it had no right to sue under contract); *Farrell Constr. Co. v. Jefferson Parish*, 896 F.2d 136, 140 (5th Cir. 1990) (finding plaintiff was not a “real party in interest” when it was neither a party to the contract nor a third party beneficiary); *BCC Merch.*, 129 F.Supp.3d at 460 (holding plaintiff was not a “real party in interest” and lacked prudential standing when it sought to assert the contract rights of its wholly-owned subsidiary); see also *Hillside Metro Assocs., LLC v. JPMorgan Chase Bank*, 747 F.3d 44, 48-49 (2d Cir. 2014), *cert denied* 2015 U.S. LEXIS 1370 (U.S. Feb. 23, 2015) (applying federal common law and holding: (“We conclude that Hillside does not have prudential standing in this case because it cannot enforce the terms of the [contract], as to which it is neither a party nor a third-party beneficiary, but the enforcement of which is a necessary component of its claim”); *Williams v. Bd. of Educ. of Chicago*, 506 Fed. Appx. 517, 520 (7th Cir. 2013) (“Neither situation describes the federal lawsuit filed by Williams, whose indefinite, inchoate claims arise entirely from a dispute between two business entities whose contracts granted him no direct or incidental benefit and thus leave him without standing to bring these claims); *Pelletier v. Rodriguez*, 2021 U.S. Dist. LEXIS 131898, at \*13 (D. Nev. July 15, 2021) (“[B]ecause there is no given reason that Clover Valley Ranch LLC could not pursue a breach of contract claim in its own name, the Court declines to confer prudential standing on Plaintiff to bring this claim on behalf of a third-party.”); *Cumming v. Felder*, 2018 U.S. Dist. LEXIS 82081, at \*5 (D. Conn. May 16, 2018) (“[A]n individual who is neither a party to an agreement nor an intended beneficiary of the agreement lacks prudential standing to sue under the agreement”) (citing cases); *Alexander v. DLJ Mortg. Cap., Inc.*, 2016 U.S. Dist. LEXIS 198193, at \* 8-14 (S.D. Miss. Jul. 5, 2016) (finding non-party to a contract lacked standing under FRCP 17(a) to bring breach of contract claims); *Henderson v. Benchmark Strategy, LLC*, 2011 U.S. Dist. LEXIS 90988, at \*10-11 (D. Colo. Aug. 15, 2011) (“Mr. Henderson is not a party to the Consulting Agreement and is not the real party in interest to assert the rights (if any) of Henderson LLP.”); *Browne v. Robb*, 583 A.2d 949, 954-55 (Del. 1990) (applying Delaware law and finding plaintiff lacked standing to assert breach of a contract to which it was neither a party nor an intended third-party beneficiary) .

real party in interest in such circumstances as these. Specifically, Rule 7017 incorporates FRCP 17(a)(3), which provides:

The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

However, because the administrative expense claims asserted in the Compliant are time-barred, granting Plaintiff/DAF leave to amend its Complaint and substitute in CLO Holdco would be futile. *See, e.g., Stripling v. Jordan Prod. Co.*, 234 F.3d 863, (5th Cir. 2000) (finding amendment “futile” when the “amendment complaint would fail to state a claim upon which relief could be granted.”). CLO Holdco would have the same problems that Plaintiff/DAF has—it didn’t comply with the Plan and Confirmation Order and timely file an administrative expense claim in the Bankruptcy Court and serve it on the Debtor by September 25, 2021.

#### IV. CONCLUSION

As this court explained in its *Taco Bueno*<sup>50</sup> decision, the requirement of filing a request for allowance of an administrative expense claim in the bankruptcy court, and the act of seeking/setting a bar date in connection therewith, are, collectively, a big deal. The concept of setting an administrative expense claim bar date is not just about protecting a debtor. It is about protecting general unsecured creditors, too—because a large administrative expense claim can greatly impact the general unsecured creditors’ share of the bankruptcy pie. That’s why a request for allowance of an administrative expense claim must be filed on the bankruptcy court’s docket and determined by the bankruptcy court after notice and a hearing. And that’s why any party-in-interest can object to the claim. But, to be clear, the Bankruptcy Code and Rules do not specifically

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<sup>50</sup> *Taco Bueno*, 606 B.R. 289.

set the deadline. *See* 11 U.S.C. § 503. Rather, a debtor typically asks for one to be set or provides for one in its plan. That’s what Highland did here. The deadline can be extended for cause under section 503(a). The Plaintiff/DAF never filed any motion seeking an extension here arguing “cause.” It only asks for an extension now—almost a year after the noticed deadline—and now that it’s clear that its District Court Action was improper. The Plaintiff/DAF’s “work-around” legal strategy here cannot be condoned.

Accordingly, it is

**ORDERED** that the Motion to Dismiss is **GRANTED** as to all causes of action asserted and the Complaint is dismissed in its entirety with prejudice.

**###END OF MEMORANDUM OPINION AND ORDER###**



1 Recorded by: Michael F. Edmond, Sr.  
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25 Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.

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1 DALLAS, TEXAS - AUGUST 3, 2022 - 2:37 P.M.

2 THE COURT: 22-3052. This is a motion to dismiss  
3 adversary proceeding. For the Movant Highland, who do we have  
4 appearing?

5 MR. DEMO: Your Honor, Greg Demo; Pachulski Stang  
6 Ziehl & Jones; on behalf of Highland. Zachery Annable from  
7 the Hayward firm is here as well. And we have Jim Seery.

8 THE COURT: Okay. Thank you.

9 All right. For Plaintiff/Respondent Charitable DAF, who  
10 do we have appearing?

11 MR. BRIDGES: Jonathan Bridges here, Your Honor.

12 THE COURT: All right. Well, I've got the pleadings  
13 here in front of me, and I saw an exhibit list of Movant/  
14 Debtor, but I think the exhibits were just all of the  
15 attachments to the amended motion to dismiss. Is that  
16 correct?

17 MR. DEMO: That's --

18 THE COURT: Or the appendix, I should say?

19 MR. DEMO: That is absolutely correct.

20 THE COURT: Okay. All right. Well, I'll hear  
21 Highland's argument.

22 MR. DEMO: And for the exhibits, we did have a  
23 discussion with opposing counsel, counsel for the DAF.  
24 Exhibit 17 is Mr. Seery's declaration. We filed the motion to  
25 dismiss under both 12(b)(1) and 12(b)(6), and so Mr. Seery's



1 declaration we would like to formally enter into evidence  
2 because that goes to what we believe is Plaintiff's lack of  
3 standing and thus this Court's lack of jurisdiction. And we  
4 do believe that extrinsic evidence is appropriate for that.

5 With respect to Exhibits 1 through 13 and then Exhibits 21  
6 and 22, those are all documents that were filed on this  
7 Court's docket and they consist of really three buckets:  
8 either complaints or orders, the plan, and then transcripts.  
9 All of those are on this Court's docket. And we would ask  
10 your Court to take judicial notice of those. And I know that  
11 Mr. Bridges may have some issues with that, but we do believe  
12 that's appropriate for a 12(b)(6) motion.

13 THE COURT: All right. So you mentioned 17, the  
14 Seery Declaration. 1 through 13, --

15 MR. DEMO: Yes, Your Honor.

16 THE COURT: 1 through 13, and 21 and 22. Or did I  
17 mishear?

18 MR. DEMO: Yes. No, that's exactly right, Your  
19 Honor.

20 THE COURT: So that's the universe of what you're  
21 asking the Court to consider? You're not asking the Court to  
22 consider 14, 15, and 18 through 20? I don't have them in  
23 front of me to --

24 MR. DEMO: 14 -- we are not asking Your Honor to  
25 consider 14, 15, 16, 18, 19, and 20.

1 THE COURT: Okay. All right. Mr. Bridges, what say  
2 you about this?

3 MR. BRIDGES: Thank you, Your Honor. Counsel is  
4 correct. We have no objection to Exhibit 17.

5 We do object to the remainder. And the remainder, our  
6 objection is because they're not referenced in the pleading  
7 and because they aren't actually evidence. What was filed,  
8 especially what was filed in a different adversarial matter,  
9 isn't evidence in this case. And that's the basis for our  
10 objection.

11 MR. DEMO: Your Honor, if I may?

12 THE COURT: You may.

13 MR. DEMO: I guess the first thing is that they were  
14 all referenced in the pleadings, Your Honor.

15 The second thing is that Your Honor can take judicial  
16 notice of things on her docket, and all of these things are on  
17 Your Honor's docket for purposes of the 12(b)(6) motion.

18 And I'm honestly a little surprised by Mr. Bridges'  
19 arguments and by Plaintiff's arguments because they ask you to  
20 do the exact same thing in their pleading. They ask you to  
21 take judicial notice of two time entries that were filed in  
22 the main docket here as evidence that we, Highland, had  
23 knowledge of Plaintiff filing the complaint in the District  
24 Court. And, you know, we're not going to quibble with that  
25 because they are on your Court's dockets and we do believe

1 that you can take judicial notice of those.

2 And I can cite you Fifth Circuit case law, if you'd like,  
3 but I think it's a fairly standard issue.

4 THE COURT: All right. I'll over --

5 MR. BRIDGES: Your Honor, one more thing?

6 THE COURT: Go ahead. Uh-huh.

7 MR. BRIDGES: I might be confused, Your Honor. My  
8 objection was the failure to reference these documents in the  
9 original complaint, the pending complaint in this adversary  
10 proceeding, not to -- failure to have referenced them in the  
11 briefing of this motion.

12 MR. DEMO: Your Honor, I don't think that changes it.  
13 I mean, Your Honor is entitled to take judicial notice of  
14 exhibits -- I mean, I'm sorry, of matters on her docket -- for  
15 the purposes of our motion to dismiss. And all of these  
16 pleadings and all of these exhibits and appendices -- the  
17 witness and exhibit list were referenced in our motion to  
18 dismiss. I don't think that changes anything.

19 THE COURT: All right. I overrule the objection. I  
20 can take judicial notice of these items, and I will.

21 MR. DEMO: Thank you, Your Honor.

22 THE COURT: All right. You may proceed.

23 MR. DEMO: Thank you. Again, Your Honor, for  
24 purposes of the record, Greg Demo; Pachulski Stang Ziehl &  
25 Jones; on behalf of Highland Capital Management.

1 We were here today on -- originally on two motions to  
2 dismiss. And our two motions to dismiss were generally  
3 identical. The first motion to dismiss, which is going  
4 forward today, is the motion -- I'm sorry, the motion to  
5 dismiss the complaint filed by the Charitable DAF Fund, which  
6 alleges that Highland breached its fiduciary obligations to  
7 the DAF as an investor in Multi-Strat during the course of the  
8 bankruptcy.

9 The second thing we were supposed to be here today on,  
10 Your Honor, was a complaint -- a motion to dismiss the  
11 complaint filed by PCMG Trading Partners XXIII. PCMG is  
12 majority-owned by Jim Dondero and wholly controlled by Jim  
13 Dondero. We did have PCMG contact us last week and offer to  
14 withdraw that motion. We were happy to accept that offer  
15 because we do think that it should have been dismissed.

16 That said, Your Honor, we were equally frustrated with  
17 that offer, because the complaint was filed over a year ago.  
18 Highland had to expend substantial resources briefing and  
19 responding to motions. And then, on the eve of trial, when we  
20 have a dispositive motion on file, they withdrew it. And that  
21 is frustrating, Your Honor.

22 And it's doubly frustrating because Mr. Dondero has come  
23 to this Court and tried to make an issue of the burn rate for  
24 legal fees in this Court. And we think that -- that the  
25 filing of the complaint and then the last-minute withdrawal of

1 the complaint is emblematic of what Mr. Dondero is doing here,  
2 Your Honor.

3 That said, we are here only on one motion to dismiss. And  
4 as I mentioned, it's our motion to dismiss Plaintiff's  
5 complaint which alleges that Highland Capital Management  
6 breached its fiduciary obligations to Plaintiff and those  
7 fiduciary obligations arose under the Investment Advisors Act,  
8 common law, and contract. And those breaches allegedly  
9 occurred in mid-2020. And that was after the petition date,  
10 after Your Honor appointed independent directors to manage the  
11 bankruptcy, but before confirmation of the plan and before the  
12 plan's effective date. And each of those causes of action  
13 primarily revolve around the Plaintiff's contention that  
14 Highland sold assets that it wasn't supposed to sell. In  
15 other words, Highland sold assets that Mr. Dondero did not  
16 want it to sell.

17 And I realize I mentioned the complaint was originally  
18 filed in the District Court for the Northern District of  
19 Texas. The District Court referred the complaint to Your  
20 Honor in May of this year, and Highland filed its amended  
21 motion to dismiss on May 22nd -- I'm sorry, May 27th, 2022.

22 And our motion to dismiss is simple, Your Honor, and it  
23 amounts to one simple question: Are the causes -- should the  
24 Court dismiss the complaint because the causes of action in  
25 the complaint are administrative expense claims that should

1 have been filed in this Court and served on the Debtor prior  
2 to the administrative expense claim bar date, which occurred  
3 in September of 2021?

4 We believe the answer to that question is yes, Your Honor.  
5 We believe it's unequivocally yes under black letter  
6 bankruptcy law.

7 But as a separate and alternative basis for dismissal, we  
8 believe that Plaintiff lacks both constitutional and  
9 prudential standing, because (1) Plaintiff, the Charitable DAF  
10 Fund, is not an investor in Multi-Strat, and that's what Mr.  
11 Seery's declaration says; and (2) the Plaintiff did not allege  
12 in the complaint how it was harmed by Highland's actions with  
13 respect to Multi-Strat when it was not an investor in Multi-  
14 Strat.

15 That's it, Your Honor. And we believe it is and should be  
16 a simple matter.

17 Plaintiff, however, has made a belated and what we believe  
18 is a procedurally-improper request to have the complaint  
19 treated as a late-filed administrative claim by this Court.  
20 We believe Your Honor should deny that request.

21 But before addressing the law, I think it's important,  
22 Your Honor, to go through the facts and to go through the  
23 timeline of this complaint, because what the facts and what  
24 the timeline will show is that there was no inadvertent error,  
25 Your Honor. There was a tactical and strategic decision to

1 file the complaint outside of this Court in the hopes that  
2 this Court would not know about it and that it could be  
3 adjudicated around Your Honor.

4 And Ms. Canty, can you please put up Slide 1?

5 And as you'll see, Your Honor, this is the timeline that  
6 we would like to discuss. So, first, February 22nd, 2021.  
7 Your Honor confirmed Highland's plan of reorganization.  
8 Highland's plan, like all plans, included clear procedures for  
9 dealing with administrative expense claims and stated --  
10 again, we believe clearly -- that all administrative expense  
11 claims are required to be filed within 45 days of the plan  
12 effective date.

13 The next date we would bring Your Honor's attention to is  
14 June 23rd, 2021. On June 23rd, the Dugaboy Investment Trust  
15 filed a complaint in the Northern District of Texas, alleging  
16 that Highland breached its fiduciary duties with respect to  
17 Multi-Strat. We did not receive notice of that hearing -- of  
18 that motion, of that complaint. But on June 25th, which is  
19 the next day here, we had a hearing in front of Your Honor on  
20 the Plaintiff the Charitable DAF's motion to reconsider the  
21 order appointing Mr. Seery as Highland's chief restructuring  
22 officer. During that hearing, we discovered that the Dugaboy  
23 Investment Trust, Mr. Dondero's family trust, had filed its  
24 complaint, and we brought that to Your Honor's attention.  
25 Plaintiff's counsel at that June 25th hearing is the same

1 counsel in front of Your Honor today.

2 During that hearing, Your Honor rightly asked Plaintiff,  
3 Plaintiff's counsel, about why it believed it could file  
4 claims rightly before Your Honor in different courts. And  
5 Your Honor rightly told Plaintiff to, and I'm quoting here,  
6 "Go back and hit the books and be prepared to defend" filing  
7 claims outside of this Court. After that hearing, Dugaboy  
8 withdrew the Dugaboy complaint.

9 The next date I would call Your Honor's attention to is  
10 July 22nd, 2021, approximately one month after that June  
11 hearing. That's the date the complaint at issue today was  
12 filed, Your Honor. The complaint -- and the complaint at  
13 issue today was never served. Plaintiff filed a motion to  
14 stay that complaint in the Northern District of Texas and  
15 never served that motion to stay.

16 Moving forward, Your Honor, November 23rd, 2021. We are  
17 here again in front of Your Honor on Plaintiff's complaint  
18 with respect to the HarbourVest settlement. And Highland had  
19 moved to dismiss that complaint. And again Plaintiff's  
20 counsel at that hearing in front of Your Honor was the counsel  
21 here today.

22 During that hearing, we also heard Plaintiff's motion to  
23 stay the HarbourVest complaint pending resolution and pending  
24 the appeal of Highland's plan of reorganization to the Fifth  
25 Circuit.



1 Plaintiff's arguments concerning the plan injunction at  
2 that hearing were essentially the exact same as the arguments  
3 they make in the response to our motion to dismiss, that the  
4 plan injunction prohibited them from doing anything. It  
5 prohibited them from prosecuting the causes of action in the  
6 complaint outside of this Court, which we agree with, but they  
7 also argued it prohibited them from prosecuting the causes of  
8 action in the complaint inside of this Court.

9 At that hearing, Your Honor -- and I'll backtrack just a  
10 second after that -- at that hearing, Your Honor, Highland's  
11 counsel was very clear on the record that they agreed that the  
12 plan injunction prohibited litigation filed prior to the  
13 effective date from occurring outside of this Court.  
14 Highland, however, was also clear that Plaintiff did have a  
15 remedy, and that remedy was to file the causes of action in  
16 the complaint as a motion for allowance of an administrative  
17 expense claim in this Court and prosecute them here.

18 At that hearing in November of 2021, Your Honor also told  
19 Plaintiff's counsel that their arguments concerning the plan  
20 injunction, and I'm quoting here, Your Honor, "reflect,  
21 frankly, a misunderstanding of how the injunction language  
22 applies."

23 Now, I'm going to backtrack, Your Honor, because I did  
24 forget a very important date, and that's the August 11th, 2021  
25 effective date of the plan. It is undisputed, Your Honor,

1 that Plaintiff received notice of that effective date, and  
2 Plaintiff's counsel was separately noticed with that effective  
3 date of the plan.

4 Those certificates of service are in Bankruptcy Docket No.  
5 2747, and are included in our witness and exhibit list as  
6 Exhibit 8. Again, it is undisputed that both Plaintiff's  
7 counsel and Plaintiff had notice of the effective date of the  
8 plan.

9 And it is also undisputed, Your Honor, that that notice  
10 disclosed that all administrative expense claims had to be  
11 filed with this Court and served on the Debtor within 45 days  
12 of the effective date of the plan, which was September 25,  
13 2021.

14 It is important to note that at no point in this timeline  
15 to date did Plaintiff's counsel -- I'm sorry, did Plaintiff do  
16 anything. Plaintiff did not file an administrative expense  
17 claim. Plaintiff did not file a motion to have their  
18 complaint allowed as timely filed. Plaintiff did nothing.

19 It was not until May of 2022 when the District Court  
20 referred this action to Your Honor and after Highland filed  
21 its amended motion to dismiss for Plaintiff's failure to  
22 comply with the administrative expense claim bar date that  
23 Plaintiff came into this Court asking leniency.

24 Plaintiff came into this Court in their response to the  
25 motion to dismiss asking Your Honor to treat their claim as a

1 timely-filed administrative expense claim. But what this  
2 timeline shows, Your Honor, and what the facts show, Your  
3 Honor, is, again, that this was not an inadvertent mistake.  
4 Plaintiff chose to file the complaint outside of this Court.  
5 Plaintiff, with notice of the effective date and notice of the  
6 administrative expense claim bar date, chose not to file an  
7 administrative expense claim in this Court.

8 Plaintiff, with Your Honor's -- Your Honor's direct (audio  
9 gap) in November of 2021 that they misunderstood the plan  
10 injunction, still did nothing, Your Honor. It was not until  
11 we moved to dismiss this action that Plaintiff requested, in a  
12 procedurally-improper way, to have their claim treated as a  
13 late-filed claim.

14 What we believe that shows, Your Honor, is that this was  
15 tactical. That what Plaintiff actually wanted was to file  
16 their claim in the District Court, which they did, and which  
17 they did not give us notice of; to stay that action in the  
18 District Court, which they did, and which they did not give us  
19 notice of; and to have that complaint sit there in the  
20 District Court until the Fifth Circuit overturned the plan,  
21 and then and only then would they litigate that action, again,  
22 away from Your Honor.

23 We believe that's highly improper, Your Honor.

24 That said, the legal question here is, again, very simple.  
25 Does the complaint include administrative expense claims that

1 are now time-barred because they were not filed in this Court  
2 by the September 2021 administrative expense claim bar date?  
3 Again, we believe the answer to that question is a simple yes.  
4 These are administrative expense claims.

5 Again, Plaintiff's complaint alleges that Highland  
6 violated its fiduciary obligations to Plaintiff in mid-2020,  
7 after the petition date, after appointment of independent  
8 directors, before confirmation, and before the effective date,  
9 at all times while Highland was the debtor-in-possession.

10 And as Your Honor knows, administrative expense claims,  
11 generally speaking, are claims that arise under Section 503(b)  
12 of the Code for the actual and necessary costs of preserving  
13 the estate and that arise from the debtor-in-possession or  
14 trustee's postpetition, pre-effective-date, ordinary-course  
15 operation of the estate.

16 And the claims in the complaint are administrative expense  
17 claims under 503(b) under the *Reading* exception which was  
18 created by the Supreme Court in 1968 in *Reading Co. v. Brown*.  
19 And as set forth in our brief, Your Honor, *Reading* is still  
20 good law. It's routinely applied in the Fifth Circuit and  
21 it's routinely applied in all circuits.

22 And *Reading*, Your Honor, (garbled) it includes not just  
23 torts, but other claims arising from intentional or other  
24 wrongful or -- wrongful acts as well. And the claims asserted  
25 in the complaint are clearly administrative expense claims

1 under *Reading*. They are claims for intentional and/or  
2 negligent violations of Highland's alleged fiduciary duty to  
3 Plaintiff during the course of the bankruptcy.

4 And Ms. Canty, if you could please put up Slide 2.

5 Now, Plaintiff tries to dodge this by saying that the  
6 definition of, quote, administrative expense claims and the  
7 plan does not include the types of claims that they allege  
8 here. But that's not the case, Your Honor. And the defined  
9 term "Administrative Expense Claim" is in the middle box of  
10 your screen. And as you'll see, it says it's any claim  
11 allowed pursuant to Sections 503(b), 507(a)(2), 507(b), or  
12 1114(2) of the Bankruptcy Code. Those include administrative  
13 expense claims under the *Reading* exception, and they include  
14 the administrative expense claims asserted in the complaint.

15 Those claims were required under the plan -- and the  
16 provisions are all right here -- again to be filed in this  
17 Court by September 2021. They were not.

18 And as I mentioned above, it is undisputed that Plaintiff  
19 had notice of the plan, that Plaintiff had notice of the  
20 administrative expense claim bar date. And it's also  
21 undisputed that Plaintiff, represented by counsel, did not  
22 file with this Court an administrative expense claim by  
23 September 25th, 2021. Plaintiff's claims are now time-barred.

24 And we believe Your Honor's *Taco Bueno* opinion is on all  
25 fours. In *Taco Bueno*, the claimant at least tried to file an

1 administrative expense claim with this Court by filing a proof  
2 of claim on the claims register. Your Honor held that wasn't  
3 good enough and it did not count as an administrative expense  
4 claim, and Your Honor barred claimant's claim in *Taco Bueno* as  
5 time-barred.

6 Here, similarly, Plaintiff, who's been represented at all  
7 times by counsel, indisputably had notice and chose to file  
8 the complaint in the District Court rather than complying with  
9 the provisions of the plan and with the provisions of the  
10 Bankruptcy Code. Under *Taco Bueno* and various cases, Your  
11 Honor, this claim is time-barred.

12 And that should end the discussion, Your Honor, but it  
13 doesn't, because Plaintiff, in its response to our motion to  
14 dismiss, finally asked this Court for leniency and finally  
15 asked this Court to treat the claim as, quote, a request for  
16 an order permitting a late claim or otherwise to have it  
17 treated as a timely administrative expense claim under Federal  
18 Rule of Civil Procedure 15.

19 But that's not how it works, Your Honor. Section 502 of  
20 the Code allows late-filed administrative expense claims only  
21 for cause. But that requires a separate motion, and it  
22 requires evidence, Your Honor. None of that happened here.  
23 Instead, Plaintiff filed a one-line request to have it treated  
24 as a late-filed claim, and it filed that request 16 months  
25 after confirmation, 10 months after the bar date, and 8 months

1 after Your Honor rejected their argument on the plan  
2 injunction.

3 There is no cause here. Plaintiff has provided no  
4 evidence of it. It just asked for leniency based on a series  
5 of what we believe are irrelevant arguments.

6 And that's where the facts again become important. As  
7 Your Honor has said, facts matter. And the facts here, the  
8 undisputed facts (garbled) Plaintiff and bely a finding of  
9 cause or excusable neglect under *Pioneer*. Again, two  
10 standards that Plaintiff has not even tried to argue.

11 And, again, Your Honor, what we believe the facts show is  
12 that there was no inadvertent technical error here. There was  
13 a considered and strategic plan to file these claims outside  
14 of this Court in the hopes of avoiding Your Honor.

15 As in *Houbigant*, which we briefed in our paper, Plaintiff  
16 is bound by those tactical decisions. And the complaint, Your  
17 Honor, we would ask be dismissed with prejudice for failure to  
18 state a -- I'm sorry, for failure to comply with the  
19 administrative expense claim bar date.

20 And lastly, Your Honor, standing. In our motion to  
21 dismiss, we sought an order dismissing this action under  
22 12(b)(1) for lack of constitutional standing and also under  
23 12(b)(6) for lack of prudential standing. And as stated in  
24 our papers and in Mr. Seery's declaration -- which, again, is  
25 Exhibit 17 on our witness and exhibit list -- the DAF, the

1 Plaintiff here, is not an investor in Multi-Strat. And all of  
2 the allegations in the complaint, all of the causes of action  
3 in the complaint, revolve around the DAF being an investor in  
4 Multi-Strat, and Plaintiff did not plead how it could possibly  
5 have standing as a non-investor.

6 Consequently, Your Honor, Plaintiff failed to plead  
7 constitutional standing, failed to plead an injury, and failed  
8 to plead prudential standing because it failed to plead how it  
9 was the real party in interest under Section 17.

10 Now, Plaintiff makes various arguments in its response  
11 about how it could have direct and/or derivative standing.  
12 But, again, Your Honor, one, we believe those arguments are  
13 meritless, and we believe that they're irrelevant, because  
14 notwithstanding the liberal amendments standard in Federal  
15 Rule of Civil Procedure 15 and the language in Federal Rule of  
16 Civil Procedure 17, we believe amendment here would be futile.  
17 For all the reasons we discussed, the claims are time-barred.  
18 And even if Plaintiff were able to amend its complaint to fix  
19 the standing issues, Plaintiff in no world can unwind and turn  
20 back the clock to be able to file the complaint in this Court  
21 as an administrative expense claim by the administrative  
22 expense claim bar date, which, again, was on September 25th,  
23 2021.

24 For the foregoing reasons, Your Honor, we ask that you  
25 dismiss the complaint with prejudice. And I'm happy to answer



1 any questions.

2 THE COURT: Okay. No questions right now.

3 MR. DEMO: Thank you.

4 THE COURT: Mr. Bridges?

5 MR. BRIDGES: Thank you, Your Honor. The last time I  
6 appeared in this Court was at the June 25th, 2021 hearing that  
7 counsel referenced. It's particularly memorable to me because  
8 of being postponed due to symptoms from a cranky gallbladder.  
9 The time before that I remember even better. That was the  
10 only other time I was before you, Your Honor. The  
11 particularly painful order that was the result of that  
12 previous time is also very memorable to me.

13 My gallbladder is no longer with us, and that order, that  
14 painful order, has been expunged at considerable costs. I was  
15 hoping that meant today would be a fresh start. Apparently, I  
16 need to go backwards just a little bit, perhaps.

17 At the June 25th hearing that counsel described, I did  
18 argue. At the end, you did ask about a recently-filed lawsuit  
19 that I didn't know anything about and told you so. You asked  
20 if Mr. Sbaiti was available, and I believe we had to go get  
21 him, and he answered your questions, and your exchange was  
22 with him.

23 I'm afraid that, again, I am unprepared and largely not in  
24 the know about the other matters that counsel has referenced.  
25 I came to argue the motion that's at issue today in the

1 adversary proceeding that we're here for.

2       The *Federal Reporters*, Your Honor, I know that you know  
3 this, they're full of opinions admonishing courts to favor  
4 resolving cases on the merits. Ever since the code pleading  
5 system was abolished, federal courts have expressed their bias  
6 in favor of addressing the merits of cases, and I would be  
7 remiss in failing to mention that here on Highland's motion to  
8 dismiss this case on timeliness and standing grounds.

9       Rule 15 and Rule 17 of the Federal Rules of Civil  
10 Procedure are among those aimed at getting cases to the  
11 merits, and we relied on both of those in our brief.

12       The first issue raised in the briefs is the classification  
13 of our allegations as an administrative expense claim. That  
14 three-word term is capitalized in the plan, indicating that it  
15 is a defined term. I read in the reply brief and heard  
16 counsel argue just moments ago that Highland views this as  
17 merely a naming convention and not as a limiting provision,  
18 the defined term. And I see that as a reasonable view of  
19 what's in the plan. But it does quite -- quite plainly appear  
20 as a defined term, with a lengthy definition.

21       Although this is not a hill we would choose to die on, and  
22 much of our response brief is devoted to alternative  
23 arguments, we don't view the allegations in the complaint as  
24 administrative in nature, nor as an expense, nor, perhaps most  
25 importantly, as the result of an action that benefits the

1 estate, as both the plan definition and Section 503(b)  
2 require.

3 Section 503(b) concerns only, quote, the costs and  
4 expenses of preserving the estate. What the complaint alleges  
5 in this matter is that the acts complained of were against the  
6 interests of the estate and depleted the estate's assets.

7 For example, Paragraph 22, which sums up the factual  
8 allegations in the complaint, reads as follows. Quote, "In  
9 short, HCMLP caused Multi-Strat to sell the viatical pool at a  
10 substantially discounted amount to curry favor with the  
11 brokers and buyers in the marketplace, for no apparent benefit  
12 to Multi-Strat's investors or the Debtor's estate."

13 This allegation does not on its face appear to be based on  
14 the result of an action that benefits the estate.

15 The second issue concerns the consequences if we're wrong  
16 about the first issue.

17 THE COURT: Let me --

18 MR. BRIDGES: The consequences --

19 THE COURT: Let me back up. Let me back up if you're  
20 moving off that point. What about the Supreme Court --

21 MR. BRIDGES: Yes, Your Honor.

22 THE COURT: What about the Supreme Court's *Reading*  
23 case or *Reading* case? If my memory -- it's been years since  
24 I've read it, but I remember it pretty well. I believe that  
25 involved a fire, right, a fire in a building that a trustee

1 was operating. Certainly, a fire and great damage caused to a  
2 third party wouldn't seem on its face to benefit the estate,  
3 as that phrasing is used in 503(b). But the U.S. Supreme  
4 Court said something to the effect of, you know, he's doing  
5 business and it's a cost of doing business that, you know,  
6 you're going to sometimes have things like this happen. And  
7 isn't that exactly the same sort of situation we have here if  
8 your allegations are true?

9 MR. BRIDGES: I don't think so, Your Honor, although  
10 I would -- would like to emphasize again this is not a hill  
11 that we would choose to die on. But I think --

12 THE COURT: Am I correct --

13 MR. BRIDGES: -- two reasons distinguish --

14 THE COURT: -- in remembering the facts of that  
15 famous U.S. Supreme Court case, that it involved a fire and  
16 that the trustee who was operating the business, it was a  
17 consequence of him operating the business? Am I correct in  
18 remembering those facts?

19 MR. BRIDGES: That sounds correct to me, Your Honor,  
20 but I don't pretend to remember it well enough to disagree  
21 with you. I would like --

22 THE COURT: Mr. Demo, --

23 MR. BRIDGES: -- to distinguish it.

24 THE COURT: -- can you confirm or tell me if I'm  
25 wrong?

1 MR. DEMO: Yeah. You're absolutely correct, Your  
2 Honor. The trustee in that case accidentally burned down the  
3 neighboring building, and the Supreme Court found that it was  
4 still an administrative expense claim under the "Reading" or  
5 "Reading" exception. And that exception provides that even  
6 though burning down somebody else's house does not benefit the  
7 estate, that it still counts as an administrative expense  
8 claim under 503(b). And we have other case that comes --  
9 other case law that comes after that that even broadens that,  
10 Your Honor.

11 THE COURT: Yes. And I know the Fifth Circuit case  
12 has cited that case in different opinions.

13 Okay. So, going back to that, Mr. Bridges, I mean, you  
14 just argued 503(b) doesn't contemplate this type of claim that  
15 -- or claims you're alleging in the action, but hasn't the  
16 Supreme Court in fact said that it does apply to this kind of  
17 thing?

18 MR. BRIDGES: Your Honor, no, I don't think so. And  
19 the reasons are twofold. One is because the fire in that case  
20 is not, I don't believe, the actions being complained of by  
21 the plaintiff. Rather, actions that are to the benefit of the  
22 estate result in negligently, accidentally, causing a fire.  
23 And that is a significant difference from here, where the  
24 actions allegedly being -- that we're alleging, that are  
25 complained of, are actually actions against the interests of

1 the estate, selling out the estate on the cheap. Your Honor,  
2 that is one distinction.

3 The other is that we're relying on the defined term, which  
4 has different language from the actual Code, which was not at  
5 issue in the other case.

6 Those are the two distinctions that I draw, Your Honor.

7 THE COURT: Well, if this is not --

8 MR. BRIDGES: The second issue --

9 THE COURT: -- a 503-type claim, then what kind of  
10 claim would it be? It has to fit into some sort of category  
11 here.

12 MR. BRIDGES: Your Honor, honestly, our position is  
13 that the order itself creates -- the final plan creates a gap  
14 by not identifying this as -- as that kind of -- as an  
15 administrative priority claim.

16 THE COURT: Okay.

17 MR. BRIDGES: The second issue, Your Honor, concerns  
18 the consequences if we're wrong about the first issue and that  
19 the consequences need not be forfeiture.

20 Counsel raises concerns about the purpose of the  
21 administrative claim bar date and the ability to distribute  
22 funds. Those concerns certainly seem valid. But importantly,  
23 they go to priority, not validity.

24 Not one of their policy arguments supports outright  
25 dismissal of the complaint, which would amount to a default

1 and would have the effect of protecting the interests of  
2 equity in this matter over the interests of a creditor.

3 Rule 15 allows for relation back of allegations from a  
4 previous filing, and we believe it governs here. Highland  
5 doesn't deny that it had notice of the complaint, so they  
6 don't have prejudice from the timing of it. And there is  
7 authority under the Code for allowing timely filing or  
8 treating as timely the filing of one type of claim that was  
9 submitted as another type of claim.

10 And on this, I'd point the Court to the Delaware  
11 *Bluestream [sic] Brands* case, 2021 Bankr. LEXIS 1980, which  
12 cites to the First Circuit and other cases allowing a timely  
13 proof of claim to be treated as an administrative expense  
14 claim.

15 THE COURT: Doesn't that --

16 MR. BRIDGES: I'm truly --

17 THE COURT: Doesn't that run contrary to my *Taco*  
18 *Bueno* opinion?

19 MR. BRIDGES: Perhaps, Your Honor. It does cite your  
20 opinion in a "*But see.*" And I again would defer to your  
21 knowledge of the proceedings in that case. But I saw in the  
22 opinion no argument whatsoever concerning the ability of the  
23 creditor to seek relief on its proof of claim regarding the  
24 same transaction. I read it not to exclude that.

25 Although the Court relied -- also, the Court relied on

1 prejudice to the creditors in that case if the administrative  
2 claim had been allowed. Importantly, in this case, where  
3 creditors can expect to be paid in full, no such prejudice  
4 exists, or at least at this stage of the claim -- of the case  
5 there is no evidence that any such prejudice to the creditors  
6 exists.

7 I'm truly unsure how to respond to the accusation that the  
8 decision to file this action in District Court was a strategic  
9 one, a strategic decision. In some regards, certainly, all of  
10 our decisions are strategic. But the implication that this  
11 was somehow a nefarious decision that should inflame the Court  
12 is simply untrue.

13 I think the timeline supports us in this, that at the time  
14 of the filing of this lawsuit the plan was not yet effective,  
15 so the route to bring an administrative claim, if that's what  
16 this is, did not appear to be available to us without the plan  
17 having gone effective.

18 Also, it appeared that it might not go effective for a  
19 year or more while the appeal to the Fifth Circuit was  
20 pending.

21 A few weeks later, I think it was less than three,  
22 approximately 20 days later, when Highland elected to make the  
23 plan effective, the injunction as we understand it precludes  
24 us from serving them from that point forward, as doing so  
25 would have been continuing with this case. The plan



1 injunction prevented us from doing so.

2 And so the accusation that we intentionally filed the  
3 lawsuit and didn't serve them with process is really about a  
4 three-week period that before we got them served we were  
5 enjoined, as we understand the injunction, from doing so.

6 I have not heard from them that we're wrong on that  
7 interpretation of the injunction. I know from their other  
8 pleadings in this matter that they view the injunction as  
9 applying to this matter. The only question I have is whether  
10 they agree with our take that serving process would have been  
11 continuing with the action.

12 THE COURT: Let me -- let me --

13 MR. BRIDGES: The notion that we --

14 THE COURT: -- double-check that I understand  
15 something you said. I think what I heard you say was, because  
16 the plan had not gone effective yet, therefore triggering  
17 the 45-day deadline for filing administrative expense claims,  
18 you had no other avenue here to pursue your claims except to  
19 file the District Court lawsuit. Is that what I heard you  
20 say, or am I misunderstanding?

21 MR. BRIDGES: Well, that's certainly more strongly  
22 than I intended to say it. I don't think so, Your Honor. But  
23 a similar vein, that the idea of filing a claim as required by  
24 the final plan was not -- was not something that had gone into  
25 effect yet. So thinking that that --

1 THE COURT: What do you mean? You can file a request  
2 for allowance of administrative claim, heck, in the first 30  
3 days of a bankruptcy case. You don't have to wait for the  
4 Court to set a deadline.

5 MR. BRIDGES: Your Honor, --

6 THE COURT: You can file one at any time.

7 MR. BRIDGES: -- we did not have an effective  
8 deadline. We did not know when that effective deadline would  
9 go effective. That process, that procedure, did not appear to  
10 be the one that was, what, most available to us.

11 THE COURT: Why not? Why not? Why not? There is  
12 nothing that would have precluded you from filing a request  
13 for allowance of administrative expense claim. People file  
14 them throughout Chapter 11 cases frequently, --

15 MR. BRIDGES: The --

16 THE COURT: -- before there's ever a deadline set.

17 MR. BRIDGES: Your Honor, the answer to that question  
18 is that reading the definition of what it was did not cause us  
19 to believe that's what we had here. That is Issue #1 over  
20 again.

21 One question -- again, one question is whether we are  
22 right or wrong on Issue 1. And I'm hearing you loudly and  
23 clearly that you don't agree with us on that.

24 But in connection with that, I don't, Your Honor, I don't  
25 think a fair conclusion is that we knew better or should have

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1 known better than to read the defined term and think that it  
2 does not apply to the case that we brought.

3 Certainly, the final order -- I'm sorry, the plan was not  
4 in effect yet, so we weren't governed by it at that time. And  
5 I believe and urge the Court to consider that a plain reading  
6 of that plan does not sound like on its face that our claim --  
7 our complaint is within its four corners.

8 THE COURT: Did you worry about the automatic stay?

9 MR. BRIDGES: Yes, Your Honor.

10 THE COURT: Okay. What is your analysis there?

11 MR. BRIDGES: Your Honor, it was well more than a  
12 year ago. I don't think I can remember that. It wasn't in  
13 the briefing for today, and it's not fresh on my mind.

14 THE COURT: You're right. You're right, it wasn't in  
15 the briefing. But, again, I'm just trying to put myself in  
16 your brains and, you know, I don't -- I will say it's a gray  
17 issue, because these are not prepetition claims, and usually  
18 362 stays collection or actions aimed at pursuing prepetition  
19 claims.

20 On the other hand, the relief sought in the DAF's  
21 complaint asked for, among other things, disgorgement of all  
22 ill-gotten gains, and also voiding of certain agreements of  
23 Highland. This sounds potentially like exercising or an  
24 attempt to exercise control over property of the estate. So,  
25 again, it's something that weighs on me a little bit.

1 But, again, it's not the subject of the hearing today, but  
2 I kind of am still interested in what your thought process  
3 was. You know, it's a very risky thing to file a lawsuit  
4 against a Chapter 11 debtor as opposed to filing a proof of  
5 claim or a request for allowance of administrative claim. So  
6 I just -- it would be helpful to hear what your analysis was  
7 on that.

8 MR. BRIDGES: Perhaps this would be helpful as well,  
9 Your Honor. At least as -- at least in my view and  
10 experience, you do not have to be a bankruptcy lawyer to know  
11 what the automatic stay is. An administrative expense claim  
12 isn't the same kind of recognized concept, I believe.  
13 Certainly, not to me.

14 And so the notion that what we were doing is sitting on  
15 our hands rather than serving the complaint because of some  
16 ulterior motive is just wrong. That's untrue. And generally  
17 speaking, in this day and age, cases aren't dismissed without  
18 reaching the merits simply because they weren't filed in the  
19 right place or with the right forum.

20 Your Honor, that brings us to the third issue, which is  
21 standing. Again, courts in this day and age do not dismiss  
22 cases without reaching the merits simply because they were not  
23 brought by the real party in interest. That's what Rule 17  
24 says quite clearly. An opportunity for the real party in  
25 interest to join must be provided. If -- if that's -- let me

1 back up. If -- because Highland admits that Plaintiff's  
2 subsidiary, CLO Holdco, is an investor who would have  
3 standing, that should end the matter there.

4 Moreover, the Plaintiff, the DAF, has alleged in  
5 Paragraphs 7 and 11 of the complaint that it is an investor.  
6 And frankly, Your Honor, I don't think that's incorrect when  
7 you view that someone can invest indirectly. That is not a  
8 peculiar concept, and I don't think it's a stretch to say that  
9 that pleading that we are indirectly an investor is an invalid  
10 one. And in Paragraph 54, it states quite clearly that, if  
11 necessary, we are seeking to plead our claim derivatively.

12 That's all I have today, Your Honor. If there's more I  
13 can answer, I will do my best.

14 THE COURT: Okay. So, am I hearing that the DAF  
15 acknowledges that CLO Holdco, its one-hundred-percent  
16 subsidiary, last I knew, that it is actually the investor in  
17 Multi-Strat, not DAF? Am I hearing that?

18 MR. BRIDGES: Mostly yes, Your Honor. I'd like to  
19 quibble around the edges. I believe it is not a one-hundred-  
20 percent-owned subsidiary.

21 THE COURT: Okay.

22 MR. BRIDGES: My recollection is that it's --

23 THE COURT: Well, forget that hundred percent. But  
24 the point is I'm hearing DAF acknowledge that it's CLO Holdco  
25 that it is at least partly an owner of, if not mostly an owner

1 of, CLO Holdco is the one that invested in Multi-Strat.

2 MR. BRIDGES: I believe Highland is correct on that,  
3 Your Honor. Yes.

4 THE COURT: Okay. So your argument is that the DAF  
5 still would have standing because it should be considered an  
6 indirect owner of interest in Multi-Strat?

7 MR. BRIDGES: Slightly different from that, Your  
8 Honor. Not only is it an indirect investor, it also is  
9 receiving investment device -- advice from Highland for the  
10 purposes of directing its subsidiaries or counsel to these  
11 subsidiaries or aiding them in making investment decisions.  
12 So that investment advice and the contract claims are still  
13 relevant, whether the investment by the DAF is direct or  
14 indirect. The relationship is, in all important aspects, the  
15 same, regardless of whether the investment in the ultimate  
16 asset is a direct one or an indirect one.

17 And Your Honor, I don't believe there's anything unusual  
18 about that relationship between a subsidiary and its -- and  
19 its parent.

20 THE COURT: You don't think there's anything unusual  
21 about what?

22 MR. BRIDGES: About the relationship --

23 THE COURT: About only naming the parent as a party,  
24 not the subsidiary that actually owns the investment?

25 MR. BRIDGES: No, Your Honor. That's not what I was

1 referring to.

2 The relationship between a parent entity that uses  
3 subsidiaries to make its investment is a not-unusual corporate  
4 arrangement.

5 THE COURT: Oh, well, certainly. I wouldn't think it  
6 would be. But I'm more focused on the parent being the  
7 Plaintiff in the lawsuit and not the subsidiary.

8 MR. BRIDGES: Your Honor, I think that's what  
9 derivative case law and the statutes that govern it are all  
10 about. This is not a novel thing.

11 THE COURT: I think you've got it flip-flopped, don't  
12 you? I mean, usually, derivative -- I mean, I guess I -- I  
13 see what you're saying. The entity has a cause of action and  
14 it won't bring it for whatever reason, so the shareholders --  
15 here, I guess you're saying the DAF -- would ask for standing.  
16 It doesn't seem like the same thing we usually -- the same  
17 context we usually see derivative litigation brought in.  
18 Would you acknowledge that?

19 MR. BRIDGES: I think in the federal courts what  
20 you're referring to is shareholder derivative actions that  
21 indeed tend to fit the paradigm you're talking about.

22 It is not unusual at all, however, for a majority owner of  
23 an LLC to bring an action that is derivative on behalf of the  
24 LLC, or a minority but a significant minority member of an LLC  
25 or another type of company to bring such action. Shareholder

1 derivatives are not the only kind of derivative action.

2 THE COURT: Okay. I think that's all the questions I  
3 have. Anything else?

4 (No response.)

5 THE COURT: Anything else? Okay. I guess -- that  
6 was directed to you, Mr. Bridges. Anything else?

7 MR. BRIDGES: I'm sorry. Not from me, Your Honor.

8 THE COURT: All right. Mr. Demo, you have the last  
9 word.

10 MR. DEMO: Thank you, Your Honor. And I'll be fairly  
11 brief.

12 Mr. Bridges I think is still -- I'm sorry, not --  
13 Plaintiff I think is still confused about what an  
14 administrative claim, expense claim is and how the *Reading*  
15 exception applies. In *Reading*, there was no benefit to  
16 burning down somebody's house. In *A.I. [sic] Copeland*, which  
17 is a Fifth Circuit case, a debtor improperly failed to turn  
18 over tax claims -- I'm sorry, tax distributions, tax payments,  
19 to the State of Texas, in violation of Texas statutes. That  
20 was an administrative expense claim.

21 All of the claims here arise from Highland's alleged  
22 intentional or negligent breach of its fiduciary duties to the  
23 DAF -- again, not an investor in Multi-Strat, but that's what  
24 was pled. All of those fall under the *Reading* exception.

25 And to Plaintiff's point about, you know, there not being



1 a benefit to the estate here, I would read you the last line  
2 of Paragraph 49, which says that one of the breaches includes  
3 utilizing the sale proceeds for its own names, namely -- I'm  
4 sorry. Utilizing -- let me start over, Your Honor. It says,  
5 "utilizing the sale proceeds for its own end, namely, to  
6 enrich itself." That's Mr. Bridges, that's Plaintiff's  
7 complaint. They are alleging that we took these actions to  
8 benefit Highland during the course of the bankruptcy.

9 Either way you slice it, Your Honor, this is an  
10 administrative expense claim. We think *Reading* is directly on  
11 point, that they have pled a substantial benefit to the  
12 estate. They basically pled that we took these assets and  
13 absconded with them.

14 Either way you slice it, under *Reading*, it applies. Under  
15 benefit to the estate, under their complaint, it applies.  
16 This is an administrative expense claim and had to be filed by  
17 the administrative expense claim bar date.

18 And, again, with respect to the plan injunction, Your  
19 Honor, even if Mr. Bridges was right -- I'm sorry. Even if  
20 Plaintiff were right, and they're not, and I do think a point  
21 needs to be made here, is that Plaintiff is the only party,  
22 Plaintiff and PCBM, are the only parties who did not  
23 understand the plan. Even Mr. Dondero's other affiliates --  
24 NexPoint, NexPoint Advisors, Highland Capital Management Fund  
25 Advisors, and CPCM -- all were able to file administrative

1 expense claims in this Court on or substantially before the  
2 administrative expense claims bar date. Plaintiff's  
3 interpretation and confusion with the plan injunction applies  
4 only to Plaintiff. They are on an island here.

5 And yes, it's also wrong. And even if Plaintiff were  
6 confused about that when they filed their complaint in the  
7 Northern District of Texas, they cannot say they were confused  
8 about that after the November 2021 hearing, where Your Honor  
9 told them bluntly and blatantly that they misunderstood the  
10 plan injunction and where Highland told them that they were  
11 not without a remedy, that their remedy was to file an  
12 administrative expense claim in this Court.

13 So, even giving Plaintiff the benefit of the doubt that  
14 they did innocently misunderstand the plan injunction, that  
15 misunderstanding ended in November of 2021, eight months ago.  
16 During that eight-month period, Plaintiff again did nothing.  
17 Plaintiff only made a request, and a procedurally-improper  
18 request, to have the claim treated as late-filed when it  
19 responded to our motion to dismiss.

20 With respect to the policy here, Your Honor, I think Your  
21 Honor nailed it in *Taco Bueno*. Bar dates are important.  
22 Administrative expense bar dates are extremely important. And  
23 so now I understand under Federal Rule of Civil Procedure 15  
24 and all the other Federal Rules you do want to get to the  
25 merits, but 503 applies here, Your Honor. There are separate

1 procedures dealing with administrative expense claims, and  
2 those procedures are important to protect not just the Debtor  
3 but all creditors in this matter.

4 This is not a two-party dispute. Bankruptcy is not a two-  
5 party game. There are other creditors here who have been  
6 waiting ten, ten years, a decade to be paid. And Plaintiff is  
7 coming in and saying, you know what, we should get an  
8 administrative expense claim. We should be able to take  
9 a-hundred-cent dollars off the top. And they're doing that,  
10 Your Honor, without any evidence whatsoever. No evidence of  
11 cause under 503(a). No evidence under *Pioneer*. And not even  
12 an attempt to plead them.

13 The policy here does not favor them. It favors the  
14 estate. It favors all other creditors in this action who are  
15 relying on the confirmed plan that has been confirmed for well  
16 over a year now, Your Honor.

17 And the last thing I'll say on standing, I do think  
18 Plaintiff's arguments on direct and derivative are just way  
19 off. But I don't think they matter, Your Honor, because,  
20 again, regardless of the liberal amendment standards in 15,  
21 and regardless of the language in 17, amendment here is  
22 futile. That is our point. It doesn't matter if they fix the  
23 standing issues. Their complaint is still going to be time-  
24 barred. And they still, like today, they still will have no  
25 evidence of cause or excusable neglect to justify that

1 complaint.

2 Again, happy to answer any questions, Your Honor, but we  
3 do think this is a straightforward matter. And with that,  
4 I'll cede my time.

5 THE COURT: Okay. Thank you.

6 The Court is going to grant the motion to dismiss. And  
7 I'm obviously going to write this up. But there's no question  
8 whatsoever that the purported claims against Highland that  
9 have been asserted in this action by the DAF concerning the  
10 Multi-Strat sales of assets, they arise from postpetition  
11 transactions, and to the extent the claims are valid, they  
12 would have given rise to postpetition administrative expense  
13 claims. There's just no -- there's no legitimate argument to  
14 the contrary on that.

15 And so that means this is a Section 503(b) issue, not a  
16 Rule 15 or a Rule 17 issue.

17 Not only did the plan provide a specific procedure for  
18 filing administrative expense claims, but 503 of the  
19 Bankruptcy Code also contemplates such a procedure.

20 And as this Court held in a lengthy opinion in the *Taco*  
21 *Bueno* case, these procedures have to be strictly complied  
22 with. It's very clear from the language of the Code, and the  
23 legislative history, if the language of the Code weren't  
24 clear, that proofs of claim are very different things than  
25 postpetition claims that arise. You file a proof of claim, a

1 simple form, for a prepetition claim. It's deemed allowed if  
2 no one objects. You don't even have to get an order. But,  
3 again, as I explained in *Taco Bueno*, a 503 administrative  
4 expense claim is a very different animal. Okay? You have to  
5 put the world on notice.

6 As Mr. Demo said, it's not a two-party dispute. It's a  
7 type of claim that potentially every unsecured creditor in the  
8 case would care about and want to weigh in on. You're held to  
9 strict proof.

10 And, again, as I noted from the Supreme Court *Reading*  
11 case, the Supreme Court has said technically there doesn't  
12 have to be a benefit to the estate. There are some things  
13 that are just a cost of doing business. A fire to a  
14 neighbor's building didn't benefit the estate, but still the  
15 victim of that fire was entitled to an administrative expense  
16 claim. But this is not even the stretch that a fire would be.  
17 So there's just zero room for argument, I think, here that the  
18 claims asserted in this action are of the nature of  
19 administrative expense claims, postpetition claims, and a  
20 request had to be filed by September 25th.

21 And to the extent a sentence or two in this response filed  
22 July 5th, 2022 is a request to file a late-filed  
23 administrative expense claim, I mean, it's procedurally  
24 improper in every way. And so I'm not going to grant any  
25 relief based on that.

1           Last, the standing issue. While I have the view that CLO  
2           Holdco would have been the party aggrieved here if these  
3           claims are valid, and there does appear to be a problem with  
4           the standing of the Charitable DAF, I think this is a moot  
5           point or an irrelevant point. While under 17 I could, in  
6           different circumstances, allow the proper party to substitute  
7           in, it would be an exercise in futility here because, again,  
8           we're ten months past the deadline for a timely filing of an  
9           administrative expense claim.

10           So, I will draft up an opinion and order in this regard.

11           Let me just throw this out here so no one is surprised or  
12           on a different page. I don't think I have to do a report and  
13           recommendation on this. And anyone who wants to weigh in can  
14           weigh in, but as you know, --

15           MR. DEMO: Your Honor?

16           THE COURT: Oh.

17           MR. DEMO: I'm sorry. I was just agreeing with Your  
18           Honor. This is the claims allowance process. This is a pure  
19           core proceeding at this point.

20           THE COURT: Okay. And so certainly I'll also hear  
21           from Mr. Bridges if he has a comment.

22           But the way I look at this is, okay, we start with the  
23           point of Judge Godbey, I think it was, had this one. He *sua*  
24           *sponte* referred this to the Bankruptcy Court. There wasn't a  
25           report and recommendation where I said, I think you should

1 either not withdraw or withdraw but let the Bankruptcy Court  
2 do pretrial matters. He just *sua sponte* did that. Okay?

3 But then a couple of additional points. Rule 7012(b)  
4 says that a responsive pleading to a 12(b)(6) or a 12(b)(1),  
5 any -- shall include a statement that the party does or does  
6 not consent to the entry of final orders of judgment by the  
7 Court. So I guess we could argue, does that apply to the  
8 Movant or does it apply to the Respondent? But I think it  
9 probably applies to the Respondent here, and so there was  
10 just nothing in the response as to whether Respondent did or  
11 did not consent to entry of a final order, so I would view  
12 that as a waiver.

13 But most importantly of all, I guess, my third point on  
14 this is I think this is an arising-in core matter, not merely  
15 related to, where consent is necessary. Because certainly  
16 the idea of do you need an administrative expense claim or  
17 not and were the proper procedures followed, I think that's  
18 core arising in.

19 So, for all of these reasons, I'm letting you know I'm  
20 not doing this in a report and recommendation. I'm just  
21 doing this in an opinion and order.

22 Mr. Bridges, anything you want to say about that?

23 MR. BRIDGES: Yes, Your Honor. If I could back up  
24 and correct myself first. I think I was mistaken about CLO  
25 Holdco. They are indeed, I am told, the hundred-percent

1 subsidiary of the Plaintiff, the Charitable DAF.

2 Secondly, yes, Your Honor, this is a Rule 12 motion in an  
3 adversary proceeding. We would object to a final order and  
4 ask you to issue a report and recommendation.

5 THE COURT: Well, you didn't put that in your  
6 response. What is your comment about that?

7 MR. BRIDGES: Your Honor, my comment on that is I  
8 feel -- I feel like my hands are tied by the injunction. We  
9 haven't been able to file any motion for leave on fear of --  
10 on pain of getting a ruling from this Court against us as to  
11 the injunction, but we don't have clarity as to what we're  
12 enjoined from and what we are not. And I guess that would be  
13 my basis.

14 THE COURT: Okay. Well, I don't know what that has  
15 to do it with putting a sentence in a response that's required  
16 by 7012(b) saying whether you consent or don't consent. I  
17 don't know what an injunction has to do with that.

18 But anyway, I do view this as an arising-in matter where  
19 consent is probably irrelevant, but I'm just dotting all our  
20 I's here.

21 All right. I will -- I've got one law clerk working on  
22 one under-advisement of Highland that I think is pretty close.  
23 I've got another law clerk working on another under-advisement  
24 in Highland that is getting there. So I think I'll probably  
25 just jot out a pretty fast opinion and order on this one,



1 because the facts on it are pretty simple, and I think  
2 probably in a few days you'll have it.

3 All right. We're adjourned.

4 THE CLERK: All rise.

5 MR. DEMO: Thank you.

6 (Proceedings concluded at 3:44 p.m.)

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CERTIFICATE

21 I certify that the foregoing is a correct transcript from  
22 the electronic sound recording of the proceedings in the  
above-entitled matter.

23 **/s/ Kathy Rehling**

**08/04/2022**

24

\_\_\_\_\_  
Kathy Rehling, CETD-444  
Certified Electronic Court Transcriber

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Date

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